# Peremptory Challenge AC

NOTES:

This was our new aff that we were planning to break at Glenbrooks 2013, but never ended up breaking.

## 1AC

### Framework

#### Oppression is unequivocally bad

#### 1. It’s a moral harm in every respect – it intentional disrespects human dignity, prevents human development and causes suffering, which outweighs on credence since it’s more likely that her framework is false than every other intuition and moral theory

#### 2. People are alike in morally relevant aspects so treating them unequally is wrong – they should be judged by things they actually choose

#### 3. Treating people unequally would make the social order unacceptable to them – any ethical theory that did not reduce inequality would be rejected by people making it useless

### Stigma Contention

#### Contention 1 is Stigma

#### The Supreme Court has held that race and sex are unacceptable bases for exclusion of potential jurors, but has yet to apply the same logic to another group that has experienced intense and violent discrimination in our judicial system: sexual and gender minorities. This is a form of exclusion that perpetuates violent stigmatization and excludes the perspective of sexual minorities – independently, it also violates the Constitution and undermines faith in the judicial system

Barry 01 [Barry, Kathryn Ann (J.D. candidate. Boalt Hall School of Law, University of California at Berkeley). "Striking back against homophobia: Prohibiting peremptory strikes based on sexual orientation." 16 Berkeley Women's L.J. (2001): 157.] AJ

In J.E.B., the Court reasoned that peremptory challenges based on sex are prohibited because they "ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women," 67 thus harming the excluded jurors and denying them equal pro- tection of the laws.6 The same reasoning supports a finding that sexual orientation is an impermissible characteristic on which to base [for] a peremptory strike. Under Romer v. Evans, the Fourteenth Amendment's guaran- tee of equal protection of the laws includes equal protection for lesbians, gay men, and bisexuals.6 ' The court could have applied the reasoning in J.E.B. regarding the exclusion of women to the exclusion of lesbians in Garcia. In doing so the court could have emphasized that allowing peremptory challenges based on sexual orientation serves to perpetuate invidious, archaic, and overbroad stereotypes about lesbians, gay men, and bisexuals. Further, it suggests that lesbians, gay men, and bisexuals, unlike heterosexuals, will not be fair and impartial on a jury even when there is no cause to strike them.7" As the Garcia court noted, in addition to perpetuating stereotypes, allowing peremptory strikes based on sexual orientation harms the excluded jurors.7 Courts that permit such strikes participate in discrimination that stigmatizes lesbians, gay men, and bisexuals and denies the perspective of sexual minorities representation in jury venires. The J.E.B. Court noted that perpetuating stereotypes and allowing state-sanctioned discrimination in the courtroom leads to an "inevitable loss of confidence in our judicial system. 72 Conversely, by forbidding peremptory strikes based on sexual orientation the court would prevent the continuation of state-sanctioned discrimination and might further a sense of confidence in the justice system. However, the JE.B. Court, in dicta, wrote that "[p]arties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."73 The Court has yet to hold that lesbians, gay men, and bisexuals are subject to heightened or strict scrutiny.7 4 Declining to base its decision on the Fourteenth Amendment, the Garcia court noted that race and sex: are the only two classifications the Supreme Court has recognized as prohibited bases for exclusion of jurors under the equal protection clause. It has not yet dealt with an equal protection challenge which did not involve the "strict" or "heightened" scrutiny . . . so it has not yet been established whether such scrutiny is a sine qua non of Batson error or merely a common characteristic.75 In doing so, the Garcia court missed a valuable opportunity to in- voke protections afforded by the Fourteenth Amendment of the U.S. Constitution. The Garcia court was wise not to base its decision entirely on the Fourteenth Amendment, since the Supreme Court has not recog- nized lesbians, gay men, and bisexuals as a group who receive more than rational- basis review.76 However, as discussed previously, the court could have invoked the support of the case law interpreting the breadth of the Fourteenth Amendment's protections." Relying on the Fourteenth Amendment offers the same benefits provided by relying on the Sixth Amendment: it increases the likelihood that courts in other jurisdictions will be able to use Garcia in addressing sexual orientation discrimination.

#### The impacts –

#### Stigma spills over beyond the courtroom and crushes social equality

Clements 13 [(Angela, J.D. (2009), UC Berkeley School of Law) “Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII” Berkeley Journal of Gender, Law & Justice, Volume 24 Issue 2 Article 2] AT

Trait discrimination can also undermine social equality by "attacking and denigrating traits that are associated with group identity" because "people often define themselves as individuals and as group members through the traits they adopt."200 This stigmatization frustrates the goal of antidiscrimination law: to achieve social equality for historically disenfranchised groups. At the same time, empirical research suggests that allowing individuals to signal membership in particular groups helps reduce prejudice, even when such signals highlight differences between groups.

#### This stigmatization perpetuates a heternormativity that culminates in mass violence against sexual others

Elias 3 (et al, Karen E. Lovaas PhD, John P. Elia PhD & Gust A. Yep PhD, Professor at San Francisco University, Journal of Homosexuality, Vol. 45, no. 2/3/4, p.18, 2003)

In this passage, Simmons vividly describes the devastating pervasiveness of hatred and violence [are] in her daily life based on being seen, perceived, labeled, and treated as an “Other.” This process of othering creates individuals, groups, and communities that are deemed to be less important, less worthwhile, less consequential, less authorized, and less human based on historically situated markers of social formation such as race, class, gender, sexuality, ability, and nationality. Othering and marginalization are results of an “invisible center” (Ferguson, 1990, p. 3). The authority, position, and power of such a center are attained through normalization in an ongoing circular movement. Normalization is the process of constructing, establishing, producing, and reproducing a taken-for-granted and all-encompassing standard used to measure goodness, desirability, morality, rationality, superiority, and a host of other dominant cultural values. As such, normalization becomes one of the primary instruments of power in modern society (Foucault, 1978/1990). Normalization is a symbolically, discursively, psychically, psychologically, and materially violent form of social regulation and control, or as Warner (1993) more simply puts it, normalization is “the site of violence” (p. xxvi). Perhaps one of the most powerful forms of normalization in Western social systems is heteronormativity. Through heteronormative discourses, abject and abominable bodies, souls, persons, and life forms are created, examined, and disciplined through current regimes of knowledge and power (Foucault, 1978/1990). Heteronormativity, as the invisible center and the presumed bedrock of society, is the quintessential force creating, sustaining, and perpetuating the erasure, marginalization, disempowerment, and oppression of sexual others.

#### Independently, the striking of homosexual jurors excludes their perspective –representing sexual minorities on juries is key to equal administration of justice and to their social empowerment – claims of essentialism are inaccurate

Burkey 12 [(Andy, journalist who covers lesbian, gay, bisexual and transgender issues, and reproductive health for the Minnesota Independent, has almost a decade of experience working to empower Minnesotans) “Discrimination Against LGBT Jurors Remains Legal” HuffPo 5/1] AT

California is one state where all three branches of government have taken a position against jury discrimination. Back in 1995, a trial judge allowed the dismissal of two women jurors from a burglary case because they were lesbians. Gays and lesbians, according to the judge, did not constitute a “cognizable group” entitled to protection in jury selection. But the California Court of Appeals disagreed. In a 2000 ruling written by Justice William Bedsworth, the court found that sexual orientation cannot be a basis for excluding jurors in California trials. "It cannot seriously be argued in this era of 'don't ask; don't tell' that homosexuals do not have a common perspective -- 'a common social or psychological outlook on human events' -- based upon their membership in that community," he wrote. "[T]hey certainly share the common perspective of having spent their lives in [being] a sexual minority, either exposed to or fearful of persecution and discrimination. That perspective deserves representation in the jury venire, and people who share that perspective deserve to bear their share of the burdens and benefits of citizenship, including jury service." Bedsworth added: "But we cannot think of anyone who shares the perspective of the homosexual community. Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' ... and such 'immediate and severe opprobrium' as homosexuals. … Both the defendant and the community are entitled to have that perspective represented in the jury venire." That court decision spurred legislation in California later that year to bar discrimination in jury selection. Members of the religious right railed against the bill. "Gays, lesbians, and bisexuals are a politically charged, activist minority fighting to advance a dangerous, radical sexual lifestyle. The bill's findings identify them as a group that has a chip on its shoulder. That is exactly the type of social segment that should be excluded from certain trials," said the Committee on Moral Concerns in testimony to the California General Assembly. But Gov. Gray Davis signed the bill. "As Americans and as Californians, jury service is one of our most fundamental civic responsibilities," Davis said. "No Californian [person] should be deprived of the opportunity to share in our system of justice simply because they are gay or lesbian." While the California law refers specifically to “sexual orientation,” analysts at the Transgender Law Center in San Francisco and Equality California, a statewide LBGT rights group, say they believe it would be interpreted as barring discrimination based on gender identity. In 2007, Oregon passed similar legislation. Activists elsewhere are looking to follow their lead. Phil Duran of Outfront Minnesota, the state's largest LGBT advocacy organization, told TAI that the bill pending in Minnesota to outlaw jury discrimination is an important one. "We believe nobody should be refused the opportunity to serve their community simply because of their sexual orientation, gender identity, or marital status in jury service," he said. "As numerous Court rules make clear, discrimination in any aspect of our justice system undermines the public's confidence that a person may have their day in court where their concerns will be heard without prejudice or bias.“ "In the end,” adds Duran, “nobody should be allowed to hang a 'no gays allowed' sign on the jury room door."

#### Jury representation is key to accurate jury deliberations – solves discrimination in the justice system

Henley 4 [(Patricia, author) “Improving the Jury System: Peremptory Challenges” Public Law Research Institute, UC Hastings College of the Law 2004] AT

Critics of the peremptory challenge system also argue that the use of peremptory challenges can harm the accuracy of the verdict. In jury deliberations, individuals with different backgrounds and perspectives can correct mistaken views or recollections of the evidence presented at trial. Peremptories which eliminate jurors who are minorities, for example, increase the chances that prejudices will go unchallenged during the deliberation process. Because of the lack of information about the jurors available to attorneys when exercising peremptory challenges, peremptory challenges are often based on stereotypes. This is harmful because the exclusion of jurors on such basis perpetuates stereotypes and discrimination. This prejudging of individuals is inconsistent with democratic ideals such as equality and fairness. Opponents also argue that peremptory challenges compromise the cross-sectional ideal. The California Supreme Court has said that the purpose of the representative cross-section requirement is "to achieve impartiality through the interaction of the diverse beliefs and values the jurors bring from their group experiences." The cross-sectional ideal is based on the idea that there is no way to escape from bias. The only way to deal with prejudice is to have a balance of various values and perspectives on the jury.

### Exclusion Contention

#### Contention 2 is exclusion

#### Dismissal of jurors based on discrimination fosters resentment against the judicial system

Henley 4 [(Patricia, author) “Improving the Jury System: Peremptory Challenges” Public Law Research Institute, UC Hastings College of the Law 2004] AT

Over 80 million living Americans have been called for jury duty. Because of the use of peremptory challenges, about 30 percent of those potential jurors were sent home. [6] The jurors who are sent home frequently leave with negative views of the justice system. Informal interviews with Los Angeles jurors dismissed as a result of peremptory challenges found that almost 95 percent of them left with an unfavorable view of the jury system. These individuals may conclude that since they were unfairly excluded from participating in that system, it is a system will not treat them fairly.¶ Those who do ultimately serve on the jury are also harmed. They learn that there is a hierarchy among citizens, rather than equality. Exclusions based on stereotypes and discrimination are acceptable in the courtroom, despite the fact that they are unacceptable in other walks of life.

#### That forces sexual minorities to remain closeted, perpetuating massive inequality

Brower 11 [(Todd, Professor of Law, Western State University College of Law; Judicial Education Director, The Charles R Williams Institute on Law and Public Policy) “TWELVE ANGRY—AND SOMETIMES ALIENATED—MEN: THE EXPERIENCES AND TREATMENT OF LESBIANS AND GAY MEN DURING JURY SERVICE” Drake Law Review Vol. 59] AT

However, before we can investigate these findings, the fact that gay people as a group have a hidden identity requires us to explore how sexual orientation visibility operates generally in American society, and how that is reflected in the courts and during jury service. Most sexual minorities are not identifiable visually, by accent, or surname.60 Accordingly, the revelation of gay identity usually occurs through speech or communicative conduct61 that breaks the assumption of heterosexuality implicit in silence.62 This assumption allows some gay people to hide their identity and avoid the negative consequences of being open about their sexual orientation.63 Nevertheless, hiding is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality.64 A Los Angeles lesbian or gay attorney discussed remaining closeted: I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say “we” and risk someone asking who “we” is. . . . [I]f someone asks, “What happened this weekend?” and I slip and [say] “we” instead of “I,” then I go through a kind of turmoil. That really requires energy that . . . prevents you . . . from achieving any peace and assurance.65 681 In addition, silence about self-identity reinforces lesbian and gay marginalization because it requires gay people to deny an essential difference between them and others. They might not share in everyday social interactions at work, in court, or elsewhere because they must mask certain aspects of their lives.66 [At social events] gay and lesbian attorneys are most likely to feel and be perceived as ‘different’—usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious . . . not fitting in.67 As the managing partner in a major Minneapolis firm noted, “‘[Hiding sexual orientation makes it] virtually impossible for [gay and lesbian lawyers] to participate fully in the culture of the workplace environment. Over time, many are driven away from their practice environments, resulting in lost opportunities for both the employee/attorney and the employer.’”68 Although these comments appear in the bar studies, the consequences of hiding or disclosing sexual orientation are also relevant to LGBT persons’ participation in the court system and other societal institutions, specifically during jury service and voir dire where direct inquiry and disclosure of jurors’ personal information often occurs.69 Further, open self-identity is important for LGBT persons.70 A heterosexual may not feel any pressure to explicitly voice her sexual orientation.71 displaying pictures of a spouse or children at work,72 by using the pronoun “we” to describe daily activities, or simply by allowing people to presume that she is heterosexual. These decisions are intuitive or unconscious for heterosexuals; gay persons must deliberately decide what to say or do and how much to disclose or allow to remain unspoken.73 Whether to publicly acknowledge one’s identity as lesbian or gay is a continuing set of choices for LGBT persons that is calibrated according to the setting, comfort level, and assessment of the consequences.74 Interestingly, the courts are one societal institution where sexual minorities’ choices about visibility differ significantly from other settings. Normally, disclosure is often made first to trusted individuals and in a safe environment, with the workplace or societal institutions like the courts provoking different tradeoffs.75 Jury service contains particularly troubling instances of these choices, perhaps because jurors find the court environment foreign or uncomfortable or because they perceive the risks of openness to be higher. Fifty-six to sixty percent of California sexual minorities did not want to state their sexual orientation during their court contact,76 although most of these court users were openly gay or lesbian in other settings.77 Over ninety percent were totally or selectively open at work, to family and friends, and within their community.78 One juror stated, “I did not tell the truth about having a partner because I was not comfortable being ‘out’ in that setting. I pretended I was single—then ‘passed’ for heterosexual.”79 At least one other juror specifically reported that he or she passed as heterosexual to avoid being subjected to mistreatment as gay or lesbian.80

#### Additionally, the perception of a hostile jury system perpetuates a cycle of exclusion and oppression

Brower 11 [(Todd, Professor of Law, Western State University College of Law; Judicial Education Director, The Charles R Williams Institute on Law and Public Policy) “TWELVE ANGRY—AND SOMETIMES ALIENATED—MEN: THE EXPERIENCES AND TREATMENT OF LESBIANS AND GAY MEN DURING JURY SERVICE” Drake Law Review Vol. 59] AT

Consequently, if people believe society and institutions are hostile, insensitive, and shut them out, or that they must hide their sexuality,160 they may avoid engagement in activities and institutions where disclosure of the characteristic is mandatory—as in jury service. Informal alternative dispute resolution mechanisms might be perceived as being better equipped to fairly handle issues by providing a better understanding of the lesbian or gay community or its values due to the private nature of such alternative mechanisms.161 For example, lesbian and gay people may prefer friends or peers address the dissolution of relationships, or they may utilize available counseling or mediation instead of the courts.162 The avoidance of judicial fora and recourse to nonjudicial alternatives has significant consequences. If sexual minorities do not bring relationship, dissolution, domestic violence, and other issues to courts, the law will not evolve in order to accommodate the different households and issues. Further, if the law is not seen as reflective or understanding of the realities of gay or lesbian life, people continue to lose confidence in those institutions and their access to them. Thus, those problems are exacerbated, creating a circle of mistrust and withdrawal.163

### Text

#### Thus, the plan text: the Supreme Court of the United States should expand the ruling in Batson v Kentucky to include sexual orientation and gender identity, requiring attorneys to disclose sexual orientation and gender identity-neutral reasoning by the client when exercising peremptory challenges to strike potential jurors. This ruling would be on the grounds of the Equal protection clause, based on the ruling in the 9th Circuit Court over Smithkline Beecham Corp. v. Abbott Laboratories. I will clarify.

Cole and Spitko 04 [Cole, Sarah Rudolph (Professor of Law, Ohio State University, Moritz College of Law), and E. Gary Spitko (Associate Professor of Law, Santa Clara University School of Law). "Arbitration and the Batson Principle." Georgia Law Review Volume 38 Number 4 (Summer 2004] AJ

Our proposed statute would ban discrimination in the selection of an arbitrator on the basis of race, ethnicity, national origin, sex, religion, or sexual orientation. In selecting these classifications, we have sought largely to mirror the classifications that the Batson principle encompasses. The sexual orientation classification arguably fits outside of the Batson principle under existing case law. We have included the sexual orientation classification within our prohibition, nevertheless, for the reasons set out below. The Supreme Court has applied the Batson principle only in the context of race and sex discrimination. 7 The Court has not considered the Batson principle in any other context. The Court's holdings and dicta in the Batson line of cases strongly suggest, however, that the Court would extend the Batson principle to other classifications that merit heightened scrutiny under the Equal Protection Clause but would not extend the principle beyond such classifications. The Supreme Court stated in dicta in J.E.B. that "[plarties may... exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." 71 This dicta and the reasoning ofBatson and J.E.B. suggest that the converse would hold: The Batson principle should extend to proscribe peremptory challenges on the basis of classifica- tions, such as ethnicity, national origin, and religion, that receive heightened scrutiny in an equal protection challenge. 7 2 As Justice Scalia commented (disapprovingly) in dissent in J.E.B., "[tihe core of the Court's reasoning [in J.E.B.1 is that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause.""' The Supreme Court has not addressed whether sexual orientation classifications merit heightened equal protection scrutiny.3 74 One of us has argued elsewhere that sexual orientation classifications should receive such heightened scrutiny, as gays and lesbians have suffered a long history of discrimination even though their sexual orientation bears no relationship to their ability to contribute to society. 75 The Supreme Court's recent opinion in Lawrence v. Texas, 76 which overruled Bowers v. Hardwick,"'has strengthened this argument immensely. 78 Our proposed statute, therefore, is consistent with the position that sexual orientation classifications merit heightened equal protection scrutiny. Our proposal to ban discrimination on these bases in most circumstances reflects our weighing of the relevant interests of society, potential arbitrators, and disputants relating to discriminatory selection, discussed fully in Part IV above.3 79 Society has interests in overcoming invidious stereotypes and in maintaining public confidence in our system of dispute resolution.'80 The potential arbitrator may have a pecuniary interest in serving on the case.3 8 ' He also has an interest in not being branded inferior by the discrimination.8 2 Finally, the disputants have an interest in reducing the likelihood that their arbitral proceeding and the arbitrator's final decision will be affected by invidious discrimination3 e and also have an interest in the public perception that they have resolved their dispute in a fair manner. 84

#### The plan conflicts with ACP and maintains truth seeking by requiring lawyers to disclose the client’s reason for the challenge.

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

Fourth, even if the first three objections are overcome, the defendant may still be able to show that a right to the unfettered exercise of peremptory challenges survives strict scrutiny because it is narrowly tailored to achieving a compelling governmental interest.25 For instance, requiring that attorneys give reasons for challenging minority jurors might frustrate the attorney-client privilege by forcing attorneys to disclose confidential communications. 26 In addition, although peremptory chal- lenges are not among the fundamental fights enumerated in the sixth amendment,27 they might be characterized as necessary to presenting a defense2' if their effective use made acquittal more likely.29 Similarly, if challenges for cause were often wrongly denied, peremptory challenges might be considered necessary to achieving an impartial jury.30

### Solvency Contention

#### Contention 3 is solvency

#### Tons of possible evidence can be used to determine when a strike is used discriminatorily

Worel and Wirtes [(Michael, 31 years of experience attorney, nation’s premier personal injury and medical malpractice lawyers; David, certified as an Appellate Specialist by The American Institute of Appellate Practice, J.D. degree from The Cumberland School of Law of Samford University) “Raising a Successful Batson Challenge in Jury Selection” Utah State Bar] AT

A trial judge must ultimately consider all relevant circumstances before drawing an inference of discriminatory intent. See State v. Valdez, 2006 UT 39, ¶ 15 n.9, 140 P.3d 1219 (“The Supreme Court has consistently declined to specify what type of evidence the challenging party must offer to establish a prima facie case, and instead has relied on trial judges to determine whether ‘all relevant circumstances…give rise to an inference of discrimination.’” (quoting Batson, 476 U.S. at 96-97) (omission in original)). Even so, Utah courts have either found or indicated in dicta that certain evidence is particularly compelling. Other jurisdictions find this evidence equally convincing in civil cases. Numerical Evidence Numerical evidence that demonstrates a discriminatory pattern of peremptory strikes supports a prima facie case. See State v. Alvarez, 872 P.2d 450, 457 (Utah 1994). To raise suspicion, numerical evidence must demonstrate that the striking party either (1) excluded “most or all” minorities from jury selection or (2) used a disproportionate number of challenges on minority venire members. See id. Most or All: • Seventy-five percent reduction of minority jurors “might raise an inference of intentional discrimination,” but a twenty-seven percent reduction (three out of eleven) did not meet the “most or all” threshold. State v. Rosa-Re, 2008 UT App 472, ¶ 4 n.1, 200 P.3d 670 (“Rosa-Re II”). • Fifty-percent reduction of minority jurors (two out of four) was not “most or all.” Alvarez, 872 P.2d at 458. Disproportionate Number: • Seventeen percent (two out of twelve) of peremptory challenges used on minority jurors was not a disproportionate number of challenges. See id. • Seventy-five percent (three out of four) of peremptory challenges used on minority jurors was disproportionate and thus supported strike opponent’s prima facie case. See State v. Pharrus, 846 P.2d 454, 463 (Utah Ct. App. 1993); Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas, Case No. 04 Civ. 10014, 2009 WL 3321047, at \*2 (S.D.N.Y. Oct. 9, 2009) (same for civil case). • Sixty-six percent reduction of minority jurors (two out of three) was sufficient to establish a prima facie claim in Jaquith v. S. Orangetown Cent. Sch. Dist., 349 Fed. Appx. 653 (2d Cir. 2009), a civil case. See id. at 654. While numerical data can help demonstrate discriminatory intent, it is unclear whether this evidence alone can support a prima facie case. See Pharrus, 846 P.2d at 462. Numerical data complemented by evidence of suspicious questioning by the strike opponent, however, has proved sufficient. See id. at 463 (finding a prima facie case where the strike opponent demonstrated both a discriminatory pattern of strikes and deficient questioning by strike proponent). Line of Questioning by Strike Proponent Courts consider the strike proponent’s questions and statements during the voir dire as important potential evidence of discrimination. See State v. Alvarez, 872 P.2d at 450, 458 (Utah 1994) (upholding a finding that defendant failed to make a prima facie case, in part, because he did not point to any discriminatory questions or statements made by prosecutor). Unless the discrimination is blatant, the most obvious initial evidence of improper motive is a complete lack of questioning. See Cantu II, 778 P.2d at 519 (holding that the strike proponent’s “desultory voir dire, uninvolved demeanor, and failure to pursue a studied or deliberate course of questioning regarding specific [juror] bias” supported a showing of purposeful discrimination). Lack of Questioning: • Strike proponent neglected to question one of the three excluded minority jurors entirely, which indicated that he made his decision solely on the basis of race and supported a prima facie case. See Pharrus, 846 P.2d at 463. • Court would have considered the argument that the prosecutor’s voir dire was “suspiciously sparse” had the challenger made it to the trial court. State v. Harrison, 805 P.2d 769, 777 (Utah Ct. App. 1991). • Civil defendant used first three strikes on minority jurors, but trial court found a prima facie case for only one of them because the juror “hardly spoke throughout voir dire.” Arizona appellate court upheld the finding. See Felder v. Physiotherapy Assoc., 158 P.3d 877, 891 (Ariz. Ct. App 2007). Once the proponent articulates a reason for the strike, the challenging party can evaluate facially neutral questions to determine whether the proponent’s line of questioning reflected her alleged concern with the juror. Although an analysis of the proponent’s explanation is technically part of step three, the Eighth Circuit has considered this as evidence in reviewing a prima facie claim. Questioning is Inconsistent with Stated Explanation: • Civil defendant claimed he excluded a potential juror based on his medical background; because the defendant neglected to ask the juror questions related to his experience in the field or whether his occupation would affect his view the case, the court found a prima facie case of racial discrimination. See U.S. Xpress Enter., Inc. v. J.B. Hunt Transp., Inc., 320 F.3d 809, 813 (8th Cir. 2003). Similar Characteristics Courts will often look to evidence of similarities between the stricken minority juror and various litigation participants to evaluate whether the strike raises an inference of discrimination. While this evidence is not conclusive, it can be supportive. See Cantu I, 750 P.2d at 597 (warning that strike opponents may not merely point to racial similarities between the prospective juror and the defendant, but concluding that the defendant did establish a prima facie case in light of all the facts and circumstances). Between Excluded Juror and Party Opposing Strike: The law initially required an excluded juror to be the same race as the strike opponent. See Batson, 476 U.S. at 89; Cantu I, 750 P.2d at 595. In the wake of Powers v. Ohio, 499 U.S. 400 (1991), racial parity is no longer required, but courts still consider it as evidence tending to show discrimination. See State v. Alvarez, 872 P.2d 450, 458 (Utah 1994) (“[R]acial or ethnic ‘identity between the [strike opponent] and excused prospective jurors’ may make it easier to prove a prima facie case.” (citation omitted)). Between Excluded Juror and Victim: Victim’s gender was relevant to establishing an inference of discrimination because “the ‘potential for cynicism is particularly acute in cases where gender-related issues are prominent.’” Rosa-Re II, 2008 UT App 472, ¶ 6 n.2 (quoting J.E.B. v. Alabama, 511 U.S. 127, 140 (1994)). The holding was limited, however, to “typical” cases where the victim was female: in a case involving a male victim, the incentive to remove jurors of the same gender arguably did not exist (or there may have even been a reverse incentive for the prosecutor to retain male jurors). See id. The Eighth Circuit considered plaintiff’s experience as a rape victim to be a relevant circumstance where defendant struck three female jurors and ultimately upheld a district court finding of prima facie discrimination. See Kahle v. Leonard, 563 F.3d 736, 740 (8th Cir. 2009). Between Excluded Juror and Empanelled Juror: • In Cantu I, the strike opponent argued that because an excluded juror had a “pro-prosecution” background and lived within a few blocks of an empanelled juror, the only plausible explanation for the strike was the juror’s race. See Cantu I, 750 P.2d at 597. The court posited several potential reasons for this exclusion, but ultimately concluded that the challenger had presented sufficient evidence to meet his initial burden of establishing a prima facie case. See id. Evidence that Counterbalances an Inference of Discrimination

#### Snyder v Louisiana bolsters our solvency – it allows a side-by-side comparison of two dismissed venirepersons to test the identity-neutral reasoning – independently it sends a signal to appellate courts that spills over

Harges 10 [(Bobby Marzine Harges is the Adams & Reese Distinguished Professor of Law II at Loyola University New Orleans College of Law) “BATSON CHALLENGES IN CRIMINAL CASES: AFTER SNYDER V. LOUISIANA, IS SUBSTANTIAL DEFERENCE TO THE TRIAL JUDGE STILL REQUIRED?” PUBLIC INTEREST LAW JOURNAL Vol. 19:193] AT

Twenty years later, the Supreme Court is still construing the Batson deci- sion.311 While the Court may have vacillated in expounding on how step two of the Batson test should be applied, the Court has continued to stress that it will not tolerate racial discrimination during jury selection in criminal cases. In Snyder v. Louisiana, the Court continued its attempt to eradicate racial discrim- ination during voir dire by underscoring that a Batson violation can result from the striking of a single potential juror. By allowing a side-by-side comparison of a prospective juror struck by the prosecutor with a peremptory challenge with jurors who were not struck by the prosecutor, trial and appellate courts should now be more able to assess the real motive of parties during jury selection, thus enforcing the Court’s mandate that racial discrimination should have no place in jury selection. While appellate courts must still grant substantial deference to trial courts in their rulings during jury selection in criminal cases, trial courts must apply each of the Batson steps according to principles articulated by the Supreme Court. They must also simultaneously announce their rulings on the record so that the reviewing courts can clearly understand the bases of the rulings relative to the exercise of peremptory challenges. Failure by the trial courts to do so can lead to reversals. Further, by emphasizing to reviewing courts that they have the power to consider all relevant circumstances bearing on racial animosity, the Supreme Court may have given appellate courts additional power to eradicate racism during jury selection. Although there are many uncertainties left in determining the validity of per- emptory challenges, Snyder v. Louisiana offers a major step toward reconciling conflicting Supreme Court precedents while more clearly explicating the re- quirements for each step of a Batson analysis. Although Snyder will most definitely not deter all instances of peremptory challenges used for discriminatory purposes, it should at least serve to make such practice more recognizable and therefore more likely to result in reversal.

### Prefiat Cards

#### We should use the academic setting to challenge the heteronormative structures that pervade society.

Elias 3 (John Elias, Professor at San Francisco University, Journal of Homosexuality, Vol. 45, no. 2/3/4, p. 64, 2003)

Akin to organized religion and the biomedical field, the educational system has been a major offender. Wedded to disseminating the idea that heterosexuality is the ultimate and best form of sexuality, “Schools have maintained, by social custom and with reinforcement from the law, the promotion of the heterosexual family as predominant, and therefore the essence of normal. From having been presumed to be ‘normal,’ heterosexual behavior has gained status as the right, good, and ideal lifestyle” (Leck, 1999, p. 259). School culture in general is fraught with heteronormativity. Our society has long viewed queer sexualities as “. . . deviant, sinful, or both, and our schools are populated by adolescent peers and adult educators who share these heterosexual values” (Ginsberg, 1999, p. 55). Simply put, heteronormativity and sexual prejudice pervade the curriculum at the elementary, secondary, and post-secondary levels (for examples of this and ways of intervening, see: Adams, Bell, & Griffin, 1997; Letts & Sears, 1999; Lovaas, Baroudi, & Collins, 2002; Yep, 2002). Besides the hegemonic hold schools have had regarding a heterosexual bias, school culture continues to devote much energy to maintaining “. . . the status quo of our dominant social institutions, which are hierarchical, authoritarian, and unequal, competitive, racist, sexist, and homophobic” (Arnstine, 1995, p. 183). While there has been modest success in addressing various forms of prejudice in schools (Kumashiro, 2001), what is sorely lacking is serious attention to how the intersections of race, class, sexuality and gender are interwoven and dialectically create prejudice (e.g., racism, classism, and hetero[sexism]). Schools would be an ideal site to interrogate, and begin to erode, the kind of hegemony upon which heterosexism rests and is supported. To date, not much is being done in a systematic fashion to disrupt the ways in which U.S. schooling has perpetuated such hierarchies. It seems to me that sexuality education is ripe for the opportunity to challenge heterosexism in school culture; however, public school-based sexuality education is presently in serious crisis, as it has turned mostly to the business of pushing for abstinence- only sexuality education. According to federal legislation, states that accept funding for this form of sexuality education require that young people are taught to abstain from sexual activity until they get married. This has numerous implications for relationship construction; a more in-depth description and analysis of this form of sexuality education will follow later in this essay.

#### The judge as an educator should reject queer oppression to interrogate the role of sexuality in the classroom.

Monson and Rhodes 4 [“Risking Queer: Pedagogy, Performativity, and Desire in Writing Classrooms” 4.1 (2004)] AT

We propose to offer here just such a critique, glossing the construction of writerly subjectivities and the institutional investments that make first-year composition a vexed location from which to take a stand against sedimented practice. As we will argue, the "subjects" of composition student writers freighted with sexualized content (as indeed are all writing subjects) and caught between contending desires-avail themselves of a fictive and temporary stabiIity in the name of rhetorical action. But because these subjectivities are formed in the crucible of institutional practice, such stability does not automatically or easily result in discursive liberation. Ultimately, in fact, we believe that liberation as an educational goal is at odds with the occulted workings of first-year composition. And yet, as we further argue in this essay, interrogating and disrupting regimes of subjectivity and sexuality such as that of first-year composition is a crucial endeavor, a "literacy" that lies at the very heart of queer composition. It is our contention that the multiple intersections of sex, sexuality, and gender already permeate the classroom in ways seldom acknowledged until recently. As one essay puts it: "Queer theory asks not that pedagogy become sexed, but that it excavate and [should] interpret the way it already is sexed and, further, that it begin to interpret the ways in which it is explicitly heterosexed" (Sumara and Davis 199). Indeed, sex has a central place in modern constructions of knowledge, ignorance, and innocence. Against claims that sex in the present age is best recognized by its repression, Michel Foucault tells instead the story of what he calls its prolixity, the conversion of desire into discourse in the name of religious pedagogy. He writes, referring to Paolo Segneri's seventeenth century decree that all sins of the flesh should be confessed as often as possible, by laymen and clergy alike: "An imperative was established: Not only will you confess to acts contravening the law, but you will seek to transform your desire, your every desire, into discourse" (21). The relationship between this early pedagogical intervention and writing is thus made clear: Whence a metamorphosis in literature: we have passed from a pleasure to be recounted and heard, centering on the heroic or marvelous narration of "trials" of bravery or sainthood, to a literature ordered according to the infinite task of extracting from the depths of oneself, in between the words, a truth which the very form of the confession holds out like a shimmering mirage. (57) To some extent, this direct confessional mode still holds sway in writing classrooms in the form of personal narrative, in which students "write what they know." More indirectly, writing classrooms-particularly first-year writing classrooms-exact confessional duty from student writers in that they often emphasize the necessity of students' finding an "authentic voice," so that even in purportedly "impersonal" genres of academic writing, there is the demanded discursive shadow of the "personal" within the text. But Foucault's dictum also describes an entire apparatus of personal revelation and "truth telling" that constructs the writing subject as one who holds sex as its secret core. Thus, self knowledge, and ultimately all knowledge, is seen to be sexual. Pedagogy, taken in its general sense as the cultural disciplines of knowledge, furthermore elicits as part of its task such self-knowledge to do the work of moral fashioning.

#### Discussion of the harms is key to resist it

Clements 13 [(Angela, J.D. (2009), UC Berkeley School of Law) “Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII” Berkeley Journal of Gender, Law & Justice, Volume 24 Issue 2 Article 2] AT

Thus, the critical question becomes: should antidiscrimination law aim for formal recognition of pluralism, or should it protect workplace policies that seek to neutralize identity, even if those policies have non-neutral effects on certain groups? To answer this question in the trait discrimination context, it is critical to identify the specific individual and societal harms associated with trait-based discrimination against certain groups. This discussion focuses particularly on harms to racial and ethnic minorities and gender nonconforming people, including lesbian and gay people.

## Add-Ons

### IMPACTS

### Gender Binary Impact

#### The impact of heteronormativity is the gender binary

Peterson 13 [(V Spike, Professor of International Relations School of Government and Public Policy) “The Intended and Unintended Queering of States/Nations” Studies in Ethnicity and Nationalism Volume 13, Issue 1, pages 57–68, April 2013] AT

To characterize something as ‘natural’ both denies its history and erases its¶ politics. As a contribution to queering states/nations, I consider in this essay the¶ history — hence politics — of ‘sex’, ‘sexuality’, and states. Reading early state¶ formation — the ‘rise of civilization’ — as constitut[e]ing and normaliz[e]ing binary sex/gender difference and heteropatriarchal kinship relations, I argue that¶ ‘making states is making sex’. Making both involves multiple, interactive¶ transformations: in sell subject and collective identities, symbolic systems of meaning, institutional arrangements, and regulatory, coercive, and juridical¶ forms of power. Once states are successfully ‘made’, to ensure intergenerational continuity they monitor biological and social reproduction. This has historically featured instituting a heteropatriarchal family/household as the basic socio-¶ economic unit, regulating women’s biological reproduction, and policing sexual activities more generally.¶ Increasingly formalized in the transition to modernity, patriarchal households and the sex/gender binary feature in the context of European state-making, the ‘international’ system of states/nations it generated, and the (nationalist) colonizing practices it proliferated These arrangements spurred heteronormative and nationalist ideologies and subjective investments in both particular (birthright)¶ political-economic arrangements and (exclusionary) ‘imagined communities’ of states/nations. In short, the heterosexian/heteronormativity of modern states is marked by hierarchical dichotomies constituting sex as male-female biological difference, gender as masculine-feminine subjectivities, and sexuality as heterosexual-homosexual identiﬁcations.‘

#### Turns case – the gender binary subordinates women and makes gender oppression possible

Knights and Kerfoot 4 [“Between Representations and Subjectivity: Gender Binaries and the Politics of Organizational Transformation” Gender, Work & Organization Volume 11, Issue 4, pages 430–454, 10 JUN 2004] AT

The distinction between male and female and masculinity and femininity continues to polarize relations between the sexes in ways that generally subordinate, marginalize, or undermine women with respect to men. The gender literature has recently challenged the singular and unitary conception of gender identity, arguing that there are a multiplicity of masculinities and femininities that are often fragile, fragmented and fluid. Despite this, the binary relationship between men and women continues to obstruct the development of sexual equality. This article is concerned with focusing critically on this binary and, in particular, its association with hierarchy, where men dominate women and masculinity assigns to femininity a marginal or ‘Other’ inferior status. It suggests that hierarchy is a condition and consequence of the reification of the binary that is difficult to challenge from within a representational epistemology that continues to dominate even studies of gender, let alone social science more generally. Deconstructing the gender binary is simply to challenge[s] the reification of the terms wherein the divisions between male and female, masculine and feminine or men and women are treated as absolute and unchanging. The article examines conceptions of masculinity and the debate between Foucauldian and anti-Foucauldian feminists as a basis for developing its argument. It then concludes that gender analysis can only deconstruct the hierarchical content of the gender binary by disrupting masculine hegemony at work. One way of facilitating this is temporarily to occupy a space between representations of gender and the conditions of subjectivity and language that make them possible.

### Root Cause of Everything

#### Challenging heteronormativity simultaneously challenges social constructions of maleness as aggressive which is the root cause of all violence, war, and domination

Tatchell 89 (Peter, Author and Activist, “Gay Liberation is Central to Human Emancipation,” May/June 1989)

Lesbian and gay liberation is therefore truly revolutionary because it specifically rejects the male heterosexual cult of masculine competitiveness, domination and violence. Instead, it affirms the worthwhileness of male sensitivity and affection between men and, in the case of lesbians, the intrinsic value of an eroticism and love independent of heterosexual men. By challenging heterosexual masculinity, the politics of lesbian and gay liberation has profound radical implications for oppressed peoples everywhere: it actively subverts the male heterosexual machismo' values which lie at the heart of all systems of domination, exploitation and oppression. Lesbian and gay liberation is therefore not an issue which is peripheral. It is, indeed absolutely central to revolutionary change and human liberation in general. Without the successful construction of a cult of heterosexual masculinity and a mass of aggressive male egos, neither sexual, class, racial, species, nor imperialist oppression are possible. All these different forms of oppression depend on two factors for their continued maintenance. First, on specific economic and political structures. And second, on a significant proportion of the population, mainly heterosexual men, being socialised into the acceptance of harsh masculine values which involve the legitimisation of aggression and the suppression of gentleness and emotion. The embracing of these culturally-conditioned macho values, whether consciously or unconsciously, is what makes so many millions of people able to participate in repressive regimes. (This interaction between social structures, ideology and individual psychology was a thesis which the communist psychologist, Wilhelm Reich, was attempting to articulate nearly 60 years ago in his book, The Mass Psychology of Fascism). In the case of German fascism, what Nazism did was merely awake and excite the latent brutality which is intrinsic to heterosexual masculinity in class societies. It then systematically manipulated and organised this unleashed masculine violence into a fascist regime of terror and torture which culminated in the holocaust. Since it is the internalisation of the masculine cult of toughness and domination which makes people psychologically suited and willing to be part of oppressive relations of exploitation and subjection, repressive states invariably glorify masculine "warrior" ideals and legally and ideologically suppress those men - mainly homosexuals - who fail to conform to them. Given that this internalisation of masculine aggression within the male population is a prerequisite for injustice and tyranny, love and tenderness between men ceases to be a purely private matter or simply a question of personal lifestyle. Instead, it objectively becomes an act of subversion which undermines the very foundations of oppression. Hence the Nazi’s vilification of gay men as "sexual subversives" and "sexual saboteurs" who, in the words of Heinrich Himmler, had to be "exterminated- root and branch." In conclusion: the goal of eradicating injustice and exploitation requires us to change both the social structure and the individual personality to create people who, liberated from masculinity, no longer psychologically crave the power to dominate and exploit others and who are therefore unwilling to be the agents of oppressive regimes (whether as soldiers, police, gaolers and censors or as routine civil servants and state administrators who act as the passive agents of repression by keeping the day-to-day machinery of unjust government ticking over). By challenging the cult of heterosexual masculinity, lesbian and gay liberation politics is about much more than the limited agenda of human rights. It offers a unique and revolutionary contribution to the emancipation of the whole of humanity from all forms of oppression and subjugation.

### EXTRA CARDS

### Perception of Fairness Impact

#### The exclusion of jurors undermines public confidence in the verdict

Henley 4 [(Patricia, author) “Improving the Jury System: Peremptory Challenges” Public Law Research Institute, UC Hastings College of the Law 2004] AT

D. Greater Confidence in Verdict When a certain group of individuals is systematically excluded from the jury process, it makes it less likely that the verdict will truly reflect the values of the community as a whole. As a result, the public will have less confidence in the jury's verdict. If peremptory challenges are eliminated, the jury will be more representative of the community and, therefore, reflect its values. The verdict, as a result, will be more widely accepted.

### Juries – Link

#### The exclusion of sexual minorities excludes their perspectives which undermines a fair jury system

Burkey 12 [(Andy, journalist who covers lesbian, gay, bisexual and transgender issues, and reproductive health for the Minnesota Independent, has almost a decade of experience working to empower Minnesotans) “Discrimination Against LGBT Jurors Remains Legal” HuffPo 5/1] AT

"This affects peoples lives," Dibble, who represents Minneapolis, told The American Independent. "LGBT people provide important perspectives in terms of jury duty," he said. "Being specifically excluded because of [sexual orientation] status flies in the face of the values that all Americans share," said Dibble. For Dibble, the issue raises the concern that people may not get a fair trial. He argues that if jurors can be dismissed for being gay or lesbian, then people accused of crimes are "not being judged by their peers."

### Juries – Impact

#### A legitimate legal system must prevent discrimination and represent every viewpoint. Exclusion and willful ignorance only furthers injustice.

Broderick 92 [(Raymond, United States federal judge, and the 24th Lieutenant Governor of Pennsylvania) "Why the peremptory challenge should be abolished." Temple L. Rev. 65 (1992): 369.] AJ

Those with a strong attachment to the status quo may oppose the total elimination of peremptory challenges from a system of justice which has, for the most part, served our country well. Our Supreme Court has awakened us, how- ever, to the fact that the use of peremptory challenges, which have enjoyed an exemption from judicial review, have fostered discrimination in our courtrooms for more than two-hundred years. This flaw in our judicial fabric must be elimi- nated. The Batson procedures may alleviate some forms of discrimination, but they will not totally eliminate the discriminatory use of the peremptory challenge. Jury trials are barometers used by our democratic society to evaluate the fairness of our judicial system. We must make reasonably certain that our juries represent the conscience of the community and that no citizen, on the basis of invidious discrimination, will ever be excluded from participating in this most important responsibility of citizenship - service on a jury. As judges and law- yers, we must provide the vital force to bring about the total elimination of the peremptory challenge.

### Random Card

#### Key to fair administration of justice

Pratt 3 [(Carla, Assistant Professor of Law, The Dickinson School of Law of the Pennsylvania State University) “SHOULD KLANSMEN BE LAWYERS? RACISM AS AN ETHICAL BARRIER TO THE LEGAL PROFESSION” Florida State University Law Review Vol 30, 2003] AT

Within the legal community, it is often said that there are certain core values of the legal profession: loyalty, confidentiality and compe- tence.2 Often overlooked, but recognized by some, is the core value of justice.3 From our history, which includes the drafting of our Consti- tution, are derived two core values that serve as the cornerstones of our system of justice, which necessarily includes the legal profession since it has the monopolistic privilege of administering justice.4 Those core values are fairness and the notion of equal justice for all.5 Equal justice is a core value of the legal profession6 because history demonstrates that without a commitment to this value, our legal sys- tem will commit atrocities against the powerless and the oppressed. Without a commitment to equal justice, lawyers are empowered to commit the racist mistakes of past administration of justice to our minority population. A commitment to equal justice is important to the professional role of a lawyer because without it lawyers will be perceived as biased and unfair administrators of justice who will threaten the orderly administration of justice by causing the public to question the integrity of the entire judicial system. Justice is not a commodity for only the majoritarian group;7 it is for all. Hence in or- der to be a lawyer, one must be committed to justice for all regardless of race. The thesis of this Article is that in order to possess the requi- site moral character to be an officer of the court and an administrator of justice, also known as a lawyer or attorney, an individual must subscribe to the core value of equal justice that serves as a corner- stone of our entire system of justice. Members of any group advocating racial caste systems, including but not limited to white suprema- cists,8 do not subscribe to these core values because they do not believe that all people are entitled to fairness and equal justice without regard to their race. White supremacists believe that justice is a commodity that only the whitest of white people should enjoy.9 Being a legal realist, I too believe that the world in which we live and practice “law” is a nomos contextualized by the narratives that locate law and give it meaning.10 The genre of narrative that locates our civil rights and equal protection jurisprudence in this country is history, and our history regrettably incorporates the narrative of racism. Although racism is an ancient concept that long pre-dates the birth of our United States Constitution,11 American racism is a unique narrative. Our long history of racism needs not to be recapitu- lated here in order to be accepted and understood as an integral part of our contemporary view of law and culture. Suffice it to say that our nation embraced the notion of racial inferiority for generations, and upon attempting to correct its evil mistake, organizations such as the infamous Ku Klux Klan (hereinafter “KKK”) were formed in an effort to maintain the status quo of white privilege and to resist the ever- evolving political, social and jurisprudential trend toward racial equality.12

## Inherency/UQ Add-Ons

### Inherency

#### Squo – no position

Burkey 12 [(Andy, journalist who covers lesbian, gay, bisexual and transgender issues, and reproductive health for the Minnesota Independent, has almost a decade of experience working to empower Minnesotans) “Discrimination Against LGBT Jurors Remains Legal” HuffPo 5/1] AT

‘The government’s ultimate position is that it takes no position’ Even under the Obama administration, the Department of Justice has declined to urge judges to bar discrimination against LGBT potential jurors. Daniel Osazuwa, a gay Nigerian immigrant was serving prison time for bank fraud in California, and was later charged with assault against a prison guard. Osazuwa argued that he was merely hugging the guard as is custom in his nation of origin and suggested that the guard’s allegations were based on his alleged prejudice against gay men. During jury selection, federal prosecutors dismissed a female juror, identified as J.T., who said that she formerly had a female “domestic partner.” When the defense challenged that dismissal, the prosecution argued that it had been motivated by the fact that, among other things, J.T. had expressed positive views about her Nigerian friends, and not by her sexual orientation. The trial judge sided with the prosecution. When Osazuwa appealed, the government argued that he had failed to show that sexual orientation was a factor in the jury selection and that the appeals court therefore shouldn’t consider whether Batson applied to sexual orientation. Nonetheless, a government brief laid out what it described as “two obvious reasons to be reluctant to extend Batson to sexual orientation.” Doing so, argued the government, “would require either prying into the understandably sensitive topic of jurors’ sexuality or inferring their orientation based on offensive stereotypes.” In addition, the government contended that discrimination based on sexual orientation “has never been linked to systematic discrimination in jury selection in the way race and gender historically were.” During oral arguments, 9th Circuit Judge Marsha Berzon brought up the Obama administration’s recently adopted position that stronger legal protections -- known as “heightened scrutiny” -- should be applied to sexual orientation. Berzon suggested that this shift might make courts more likely to decide that the LGBT community should be covered under Batson. “What,” asked Judge Berzon, “is the government’s ultimate position” on the matter? “I’m going to frustrate you, your honor,” responded Assistant U.S. Attorney Mark Yohalem, “because the government’s ultimate position is that it takes no position on that.” The appeals court ultimately declined to decide whether removing jurors based on sexual orientation is unconstitutional, ruling instead that the trial court had not clearly erred in accepting the prosecutor’s explanation that J.T. had been dismissed based on her friendships with Nigerians. Asked about the Justice Department’s position on jury discrimination, a spokesperson told TAI, “We are always looking for ways to address unfair discrimination in our justice system including discrimination based on sexual orientation. We have no additional comment at this time.”

### Discrimination High Now

#### Discrimination is a widespread issue – empirics verify.

Brower 11 [(Todd, Professor of Law, Western State University College of Law; Judicial Education Director, The Charles R Williams Institute on Law and Public Policy) “TWELVE ANGRY—AND SOMETIMES ALIENATED—MEN: THE EXPERIENCES AND TREATMENT OF LESBIANS AND GAY MEN DURING JURY SERVICE” Drake Law Review Vol. 59] AT

Sexual orientation significantly affected court users’ experiences—the dominant pattern was degradation in lesbian and gay jurors’ and other court users’ experiences when sexual orientation became visible, either as a topic in the court proceeding or as a characteristic of the court users themselves. Although present in the New Jersey report and bar studies,21 this pattern is most obvious in the California data because that survey specifically inquired about two different court experiences: the most recent California court contact and another significant contact in which sexual orientation became an issue.22 The California survey results for respondents’ most recent court contact provided a typical, baseline experience for sexual minorities’ treatment and perceptions of fairness in California courts.23 By focusing on the most recent contact, the survey randomly sampled lesbian and gay court users’ experiences, rather than having them describe a court contact they deemed negatively or positively noteworthy.24 Sexual orientation was overwhelmingly not pertinent to the individual’s latest court contact and thus could be used as “a comparison with the other significant court contact.” 25 Importantly for this Article’s focus, sixty percent of lesbian and gay court users’ most recent experiences concerned some manner of jury service, rather than an experience as a party, lawyer, or witness.26 However, when the contact was “one in which sexual orientation became an issue, most often that contact was as a participant, either as a litigant or attorney.”27 In that most recent, predominantly jury service contact, not all sexual minority court users had positive experiences; their sexual orientation still colored their treatment. One respondent explained, “In a domestic abuse case, the judge did not ask me the same questions she asked other potential jurors regarding my relationship with my companion or my experience with domestic abuse.”28 Moreover, the more active participants became, the greater the incidence of negative treatment.29 Although 10.8% lesbian and gay court users believed they were treated differently from everyone else in their most recent primarily jury service contact, that percentage increased to 25.5% when more lesbian and gay court users actively participated as a party, witness, or lawyer in the other significant court contact.30 Similarly, in their most recent, primarily jury service contact, 19.6% of respondents felt those who knew their sexual orientation treated them with disrespect,31 while 29.6% of lesbian and gay court users felt those who knew their sexual orientation did not treat them with respect in their more active court contact.32 Finally, 13.6% “agreed somewhat or strongly with the statement, ‘My sexual orientation was used to devalue my credibility’” in the most recent, primarily jury service contact.33 In contrast, 39% of lesbian and gay court users agreed somewhat or very strongly with the same statement in the more active participation contact.34 Accordingly, the more sexual minorities became involved in court proceedings, the quality of their experiences worsened. Although feelings of discriminatory treatment and bias were greater when sexual minorities were more active court participants, they also had negative experiences during jury service. Additionally, in the other significant court contact that predominantly involved sexual orientation issues,35 22.2% of respondents experienced such contact as a juror or during some form of reporting for jury service.36 Survey respondents’ agreement with the statement “[a]s far as I could tell, I was treated the same as everyone else” dropped from 89.2% in their most recent contact to 74.5% in the other contact.37 Respondents’ perception of respectful treatment also fell from 80.4% to 70.4% in these same settings.38 The survey asked identical questions in both contexts, 39 indicating the difference is a function of the nature and duration of these court experiences. Sexual orientation visibility, either as a topic within the court proceeding or as a court user characteristic, significantly affected lesbian and gay jurors’ and court users’ treatment and perceptions of fairness. 40

### Explanation of Batsons 3 steps

Worel and Wirtes [“Raising a Successful Batson Challenge in Jury Selection” Utah State Bar] AT

A Batson analysis involves three steps: first, the party opposing a peremptory strike must establish a prima facie case of discrimination (“step one”). See Purkett v. Elem, 514 U.S. 765, 767 (1995). Then, the proponent of the strike is required to provide a neutral explanation for the strike (“step two”). See id. Finally, the trial court evaluates whether the strike constituted purposeful discrimination (“step three”). See id. The ultimate burden of persuasion lies with the party opposing the peremptory strike. See id. at 768. Therefore, if the strike proponent offers a sufficiently neutral explanation at step two, then the party opposing the strike must convince the trial court at step three that the explanation is a pretext for purposeful discrimination. See id. As such, a party seeking to challenge discrimination in the jury selection process must be prepared to satisfy both step one and step three of the Batson analysis.

### SCOTUS Accepts the Case

#### The case is likely to go to the Supreme Court

Amar 13 [(Vikram David Amar, a Justia columnist, is the Associate Dean for Academic Affairs and Professor of Law at the University of California, Davis School of Law) “Another Front in the Same-Sex Equality Campaign” Justia Aug 13] AT

The oral argument in Smithkline should be interesting. The panel of Judges Schroeder, Reinhardt and Berzon is, even more so than the three-judge panel in the Proposition 8 case, liberal by Ninth Circuit standards. If one had to bet, one might expect this panel to frown on the use of sexual orientation as a basis for peremptories. And if the Ninth Circuit does invalidate sexual-orientation-based peremptories, then the Supreme Court may end up being interested in the case, and could render a ruling that would, directly or indirectly, bear on the question of same-sex marriage bans too. A lot to keep watch on in the coming months.

### A2 Garcia Non-unique

#### Garcia fails

Barry 01 [Barry, Kathryn Ann (J.D. candidate. Boalt Hall School of Law, University of California at Berkeley). "Striking back against homophobia: Prohibiting peremptory strikes based on sexual orientation." 16 Berkeley Women's L.J. (2001): 157] AJ

While the court's opinion painted a more positive picture of lesbians and gay men than many opinions have, 3 it was limited in three important ways. First, the court based its analysis almost exclusively on California law and failed to stress the importance of the U.S. Constitution. 4 Thus, it is unlikely that courts outside of California will be able to successfully apply the reasoning in Garciato protect the rights of other lesbians, gay men, and bisexuals. 5 Second, while the press has described the holding in Garcia as forbidding the use of peremptory strikes to exclude persons from jury service based on sexual orientation, 6 this may not be an accu- rate characterization of the court's decision. In dicta, the Garcia court noted that sexual orientation was not an issue in the underlying criminal case. 7 Thus, one could argue that the court would permit exclusions based on sexual orientation in a case where sexual orientation is an issue in the underlying claim.' Third, the Garcia court failed to offer any guidance on how the court should respond when an attorney strikes a juror solely because of the attorney's perception of the juror's sexual orientation. 9

# Substance Blocks

## A2 Eliminate Peremptory CP

### Top

#### My position is that peremptory challenges should be limited, not eliminated – this allows both sides to shape juries without allowing unchecked discrimination – three disads to the CP

#### 1. Peremptories are key to eliminating biased jurors – this makes the system more fair and less discriminatory

White 9 [(Ken, criminal defense lawyer with Brown, White & Newhouse) “Peremptory Challenges — The Worst System, Except For All The Other Ones” Pophat Mar 5] AT

Look, peremptory challenges are problematical. They've inspired half a century of bitter racially charged constitutional litigation, and the system has only relatively recently been dragged out of the mire where jury selection was a frank and open exercise in racism. Racism still plays a role. Lawyers still challenge based on race, now after spending some effort to devise race-neutral criteria (and sometimes doing a piss-poor job of it.) And even when lawyers think they have race-neutral reasons, those reasons are informed by the lawyers' racial attitudes. When they aren't racial, they are frequently irrational along other social or cultural fissures. (As a prosecutor I once used a peremptory against a ballet dancer. Why? I thought ballet dancers would acquit. My trial partner thought that was utterly irrational. She may well have been right.) Yet, as my title suggests, I think they are the worst system possible save for all of the others. Jury selection is an art and not a science, no matter how much high-priced consultants would like to convince you otherwise. But it is, on occasion, a useful art. It's rare to have someone as patently unsuitable as my potential juror who was open in her scorn of blacks wanting to be called African Americans. But it happens, and peremptory challenges are the only reliable way to get rid of such people, given how lax the standards are for challenges for cause. On plenty of other occasions, potential jurors simply rub me the wrong way. Sometimes it's not even something I can articulate — I'm picking up on nonverbal signals I can't even identify. I've always been happy to get rid of such people when I can, and when I can't (for instance, because I've run out of peremptories), my instincts have often been proved correct — that person has voted against me or wrecked havoc in the jury room. I can't offer a science-based process for identifying such people, any more than I can devise a science-based formula for an effective closing argument. But experience has taught me that when I have some discretion to strike oddballs and outliers, I am more likely to get a good result — and more likely to get a jury that will focus on the issues rather than on bizarre diversions. That experience has been consistent both as a prosecutor and as a defense lawyer. There are no crazy-filters on jury service. Of the first twelve people to show up in the box, three may be gadflies, grudgeholders, or nuts. Absent my ability, and my opponents' ability, to weed some of those people out, that handful of people may shape the experience for everyone in the courtroom. That's not the way to get a fair trial on the merits for anyone.

## A2 Peremptories Good

### Top

#### This is compatible with our positions – peremptory challenges are good, but they shouldn’t be completely unlimited – make them prove why discriminatory challenges are good

### Discrimination Ev

ONLY CASE THESE WILL BE NECESSARY – IF THEY READ CHILLING EFFECT PROPERLY

#### Subconscious biases mean most exercises of peremptory challenges will be biased – limiting all instances of the challenge is good

Young 11 [(Kathryne M, PhD candidate in the Sociology Department at Stanford University, and received her JD from Stanford Law School) "Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire." Willamette L. Rev. 48 (2011): 243.] AJ

In his Batson concurrence, Justice Thurgood Marshall argued that the only way to purge discrimination (in that case, racial) from jury selection was to eliminate peremptory challenges altogether.95 Even if attorneys genuinely believed that they were not racist, he said, subconscious biases were sure to enter into the process; 96 therefore, even the most progressive attorneys' "gut" impulses are likely to be influenced by prejudice. Justice Marshall's fear has borne out in the social psychological literature. Jennifer Eberhardt and others have found that subconscious anti-black sentiments are often present even for people who do not consciously hold racist beliefs, and that these sentiments can affect even split-second judgments. 97 Such "intuitive" judgments are at the crux of jury selection; a thin line exists between a stereotype and a hunch. Eberhardt's findings suggest that even if attorneys don't believe that they are striking jurors on the basis of socially stigmatized characteristics, unconscious processes are at play. For example, a prosecutor may genuinely believe that he is striking a black juror because the juror said he trusts police "some of the time." But unbeknownst to the prosecutor, she might not have stricken a white juror who made an identical statement. Unless unstricken white jurors had, in fact, made the exact same statements (that is, unless the proffered justification for a strike applied equally to jurors of two races, but jurors of just one race were stricken98), the peremptory would probably survive a Batson challenge. It is not at all clear that the Batson majority contemplated the extent to which unconscious biases could be at work. Psychological and sociological research has shed more light on the nature of bias in the last quarter-century or so since Batson was handed down; it is time for the voir dire process to incorporate the accepted social science literature on the subject. Justice Marshall went further than subconscious biases, however. He predicted that Batson might not protect against conscious biases either, since the threshold for overcoming a Batson challenge is so easy to reach. He wrote, "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."99 Echoing Justice Marshall's concern, Akhil Reed Amar has suggested that barring a prejudice that would impair the juror's ability to decide a case fairly, the first twelve people in the box should comprise the jury. l00 One way to read Amar's argument (though he ultimately suggests eliminating most for-cause challenges as well) is that peremptory challenges serve no legitimate purpose as long as for-cause challenges are working as they should; if for-cause challenges eliminate biased jurors from the venire, there is no legitimate role left for peremptories. After all, parties have no constitutional right to eliminate prospective jurors who would make perfectly good jurors but hold beliefs the parties do not prefer. They are merely guaranteed the right to a fair and impartial jury.

#### At worst prosecutors will just use challenges for cause – these solve the impact without causing discrimination

Broderick 92 [(Raymond, United States federal judge, and the 24th Lieutenant Governor of Pennsylvania) "Why the peremptory challenge should be abolished." Temple L. Rev. 65 (1992): 369.] AJ

More fundamentally, Batson does not and cannot abate the discriminatory use of the peremptory.354 Judge Higginbotham, former Chief Judge of the Third Circuit Court of Appeals, has observed: I have been similarly disturbed in the past year by a series of other cases where the Batson issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted. 355 This is at least in part due to courts' inability or unwillingness to engage in the difficult and distasteful task of determin[e]ing whether a member of the bar is telling the truth about his or her motivations. In a sense, courts have replaced their earlier practice of accepting at face value the assertions of jury commissions that no discrimination has occurred with the assertions of attorneys to the same ef- fect. Such unquestioning reliance now, as then, reduces the Equal Protection Clause to a "vain and illusory requirement." 356 The Batson procedure is also inherently underinclusive. Proper judicial oversight may curtail some discriminatory peremptory challenges in cases where potential jurors are stricken on the basis of their race or gender since these char- acteristics are generally apparent. 357 The Batson limitation can do little, if any- thing, however, to curtail strikes based on the religious beliefs or ethnic origins of potential jurors, because these characteristics are usually not cognizable. The total elimination of peremptory challenges can be expected to increase the use of challenges for cause and require the trial judge to determine whether the potential juror will be biased or fair. The greater resort to challenges for cause is a small price to pay for the eliminat[e]ion of a procedure which has permitted officers of the court to exclude citizens who may be well-qualified jurors from exercising their constitutional right to serve on the jury. Since the challenge for cause is made on the record and must be ruled on by the trial judge in open court, exclusions for cause are subject to public view and appellate review. The increased use of challenges for cause will provide no assurance that some jurors partial to one side or the other will not be seated on the jury. The increased use of challenges for cause and the elimination of peremptory challenges will, how- ever, terminate a procedure which has violated the constitutional right of venirepersons to serve on the jury.

## A2 Chilling Effect

### No Chilling Effect

#### The aff doesn’t apply to every instance of the chilling effect – the aff only affects the instance of attorney-client reasoning about which jurors to strike so the neg must prove why chilling effect undermines these communications specifically and why it’s important

#### The lawyer can hide the fact that information was suggested by the client, without withholding the information itself – this prevents the chilling effect without inhibiting aff solvency

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

The second proposed compelling interest is protection of the defendant's attorney-client privilege. Yet, while preservation of the attorney- client privilege is undoubtedly of compelling interest to society, the inter- est is only as extensive as the privilege itself. If a Batson-like rule requiring defense attorneys to articulate non-racial reasons for challenging prospective jurors does not violate the privilege, the defendant's interest vanishes. The attorney-client privilege protects the content of communica- tions between defendants and their lawyers.94 Under a Batson-like rule, however, no situation is likely to arise in which the content of any com- munication must be disclosed. The only communication from client to attorney that would have to be disclosed would be the client's reasoning about whom to excuse. Under a Batson-type rule, illogical reasons would not be adequate justification for the racist use of peremptory challenges. Thus, if the client expressed a general dislike of African-Americans, this could not be put forward as a legitimate non-racial justification for challenging jurors. Similarly, any other illogical reason expressed by the cli- ent, such as "I don't like people whose occupations start with the letter P; get rid of that pipe-fitter,"95 would not justify the challenge. Therefore, illogical reasons will not be disclosed. If the client communicates to the attorney a legitimate reason for challenging a prospective juror-such as telling the attorney that a juror seemed hostile to,9 6 avoided eye contact with,9 7 or seemed nervous about9" the client-the attorney can justify the challenge by explaining the reason, without disclosing that it was suggested by the client. A statement by the attorney that "My reason for removing this prospective juror is not because she is black, but because she seemed hostile to, avoided eye contact with, or appeared nervous about my client," dis- closes no confidential communication and is therefore not within the privilege. 99

#### Also this argument is super-non-unique – in the status quo, peremptory challenges cannot be exercised for racial or gender-based reasons which means the chilling effect – they have to prove why the addition of sexual minorities uniquely affects the chilling effect

#### The chilling effect shouldn’t apply to allow illegal cases

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

In any event, the attorney-client privilege is not a license to commit illegal acts. The privilege has never applied to conspiracies between lawyer and client to commit future crimes or frauds."0 2 If a client consults with the lawyer about a proposed course of action and is told that the action would be unlawful, the privilege is preserved so long as the client desists from the unlawful conduct.103 If the client persists in committing an illegal act, however, the privilege does not apply. Engaging in intentional racial discrimination is an unlawful act. The privilege "may be a shield ... as to crimes already committed, but it cannot be used as a sword ... to enable persons to carry out contemplated crimes against society. [It] does not make a law office a nest of vipers in which to hatch out frauds and perjuries."' Just because the illegal act may gain a tactical advantage for the defendant and increase his chances of acquittal does not bring it within the privilege. 105

### Peremptory Challenge Bad

#### The impact to the chilling effect is lack of effective legal advice – the result will be less application of the peremptory challenge – but the aff is a huge impact turn – the peremptory challenge is a bad thing since it leads to discriminatory uses

## A2 Constitution

## Offense

### 6th Amendment

#### Turn: The 6th Amendment requires a jury that is representative of the entire community. Excluding jurors due to sexual orientation violates the litigant’s right to an impartial jury.

Barry 01 [Barry, Kathryn Ann (J.D. candidate. Boalt Hall School of Law, University of California at Berkeley). "Striking back against homophobia: Prohibiting peremptory strikes based on sexual orientation." 16 Berkeley Women's L.J. (2001): 157] AJ

The Sixth Amendment of the U.S. Constitution guarantees the right to a trial by jury and requires that the jury be impartial.0 The U.S. Supreme Court has interpreted impartiality to require a jury drawn from a representative cross section of the community.5' The Court has warned that "[t]endencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representa- tive group are undermining processes weakening the institution of jury trial."52 The Court has also explained that "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."53 As mentioned previously, courts allow peremptory strikes to aid the court in ensuring that the jurors are impartial,' but prohibit attor- neys from using peremptories to strike jurors because of their membership in cognizable groups.55 For example, courts have found that excluding blacks56 and women 7 from juries violate the Sixth Amendment's imparti- ality requirement. In Garcia,the appellate court failed to stress the importance of the impartiality requirement of the Sixth Amendment in its analysis."5 Using peremptory strikes to challenge individuals on the basis of their sexual orientation is unfair to the litigants who are denied a jury drawn from a representative cross section of the community. By striking lesbians, gay men, and bisexuals, attorneys are effectively preventing litigants from having their trials judged by a group that includes perspectives of all cog- nizable groups in the community. Furthermore, this exclusion sends the message that the perspectives of sexual minorities are not valued and in- deed should not be represented on juries." Thus, striking lesbians, gay men, and bisexuals because of their sexual orientation undermines the jury system, prevents representation of a cross section of the community, and cannot be squared with the constitutional concept of ajury trial. Interestingly, the Garciacourt focused on the California Constitu- tion, which makes no mention of 'impartiality,' and declares only that "[tirial by jury is an inviolate right and shall be secured to all."' The California Supreme Court did not interpret the state constitution to re- quire impartiality until 1978 in People v. Wheeler.6' Justice Mosk, writing for the court, stated, "we now make explicit what was implicit . . in this state the right to trial by ajury drawn from a representative cross section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution., 62 Thus, the decision in Garcia could be sup- ported equally and independently by the federal and state constitutions. Moreover, stressing the support of the Sixth Amendment would have in- creased the likelihood that courts outside of California could rely on Gar- cia in prohibiting peremptory strikes based on sexual orientation.

### Equal Protection

#### Extend the Barry evidence – the equal protection clause creates an obligation on the state to prohibit discrimination against jurors – this reasoning has already been applied in the court cause Batson v Kentucky so it’s confirmed by a Supreme Court ruling.

#### More evidence – Peremptory challenges on the basis of sexual orientation violates the 14th Amendment by violating equal protection.

Barry 01 [Barry, Kathryn Ann (J.D. candidate. Boalt Hall School of Law, University of California at Berkeley). "Striking back against homophobia: Prohibiting peremptory strikes based on sexual orientation." 16 Berkeley Women's L.J. (2001): 157.] AJ

In addition to the Sixth Amendment, the Garcia court could have used the Fourteenth Amendment to support its decision. The Fourteenth Amendment of the U.S. Constitution guarantees equal protection under the laws. 63 The U.S. Supreme Court invoked the Fourteenth Amendment when it prohibited the exclusion of black Americans from juries in 1879.' Then, in 1954, the Court in Hernandez v. Texas held that Mexican Americans were also included under the Fourteenth Amendment and therefore must not be excluded from jury service.65 Finally, in 1994, the Court in J.E.B. v. Alabama ex rel T.B. ruled that courts must not allow individuals to be excluded from juries based on their sex because "[sex], like race, is an unconstitutional proxy for juror competence and imparti- ality."66 These cases illustrate that the Fourteenth Amendment prohibits various incarnations of discrimination in jury selection. Thus, the Garcia court could have relied, at least in part, on the Fourteenth Amendment in articulating its prohibition against exercising peremptory strikes based on sexual orientation.

### Equal Protection---Empirics

#### Already exists for civil trials nationally, and criminal trials in CA

Woods 13 [(William, assistant head deputy of the Los Angeles County District Attorney’s Training Division and the chairman of the department’s Professional Responsibility Committee) “Wheeler/Batson: Anti-bias procedures in jury selection” CA Bar Association Nov 2013] AT

California also prohibits the use of peremptory challenges based on gender or sexual orientation. (Code of Civ. Proc., § 231.5; People v. Williams (2000) 78 Cal.App.4th 1118, 1125.) In 2000, the California Legislature statutorily adopted Wheeler, applying the anti-discrimination standard to both civil and criminal trials. (Code of Civ. Proc., § 192.) Similarly, in Edmonson v. Leesville Concrete Co. (1991) 500 U.S. 614, 630-631 [111 S.Ct. 2077; 114 L.Ed.2d 660], the U. S. Supreme Court barred peremptory challenges based on group bias in civil lawsuits in federal district court.

### Equal Protection---4 Requirements Met

#### The equal protection clause excludes discriminatory peremptory challenges

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

The analysis begins with the most similar case, Batson v. Ken- tucky, 10 and asks if it was correctly or incorrectly decided under the equal protection clause. The commentators agree that the result in Bat- son was the right one.11 The prosecution was properly prohibited from making race-based peremptory challenges because all four criteria for a successful equal protection claim were satisfied: (1) the African-Ameri- can defendant on trial was a person protected by the equal protection clause; 2 (2) the defendant was a member of a racial minority with standing to object to the state's race-based challenges;' 3 (3) when prosecutors exercise challenges, they engage in state action, 4 so judicial scrutiny is justified; and (4) the state could demonstrate no compelling interest in excluding minorities from jury service.' 5

### Equal Protection---A2 State Prosecutor is not a Person

#### 1. Equal Protection applies to jurors as well, not just the prosecutor, so even if the prosecutor lacks rights it can apply – multiple decisions prove

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

Further, the prosecutor represents the community. Minority jurors and minority members of the community can claim entitlement to constitutional rights, including the equal protection right not to be discrimi- nated against. In Batson, the Court stated that the harm from racist jury selection touches the entire community, harming both the community and the particular jurors who were excluded.4 5 Earlier, in Swain v. Ala- bama,46 the Court said that racist jury selection denies blacks in the com- munity "the same right and opportunity to participate in the administration of justice enjoyed by the white population."'47 This approach has already been used by several states to prohibit racially discriminatory peremptory challenges by defendants.48

#### 2. That’s irrelevant – courts prove

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

a. The scope of the equal protection clause: The first issue is whether a state prosecutor may assert a right to equal protection at all. While it is technically true that the state is not a "person" and therefore has no constitutional rights, in practice this statement is frequently trivial. Once the trial starts, the Supreme Court has held that, in many situ- ations, the state's attorney is considered a litigant entitled to the same rights as other litigants. In Singer v. United States3, 9 for example, the Court stated that "the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."'

#### 3. There are other sources of that right

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

Even if the state lacks constitutional rights in the formal sense, the inquiry is not ended. The Constitution is not the only source of a litigant's rights, nor do all constitutionally-based rights, however unimpor- "the community at large." tant, necessarily trump all non-constitutional interests. In United States 41 v. Valenzuela-Bernal, for example, the Supreme Court balanced the government's "vitally important" statutory duties under the immigration laws against the defendant's constitutional right of compulsory process. 42 Although the government had deprived the trial of material witnesses by deporting those witnesses, the Court held that the government's statu- tory duty to deport illegal aliens outweighed the defendant's sixth amendment rights.43 Similarly, a number of states have held that the prosecutor is entitled to the same kind of fair trial as the defendant, regardless of whether the prosecutor's right is found in the constitution, statutes, or the common law.44

## General Defense

### Doesn’t Matter

#### Constitution NCs don’t apply to courts affs – their burden is to prove that this Supreme Court ruling would be banned by the Constitution – but that is not possible since the whole of point of the Court is to rule on the Constitution and they have the authority to do so – whatever ruling they reach would become a Constitutional principle.

### Weighing – ACP

#### The exercise of the ACP is outweighed by other constitutional obligations

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

Even if a limitation on defense peremptory challenges does conflict with the attorney-client privilege, the privilege will not necessarily prevail. In other cases in which claims of privilege conflicted with constitutional principles, the privilege had to yield. In Davis v. Alaska,106 the Supreme Court held that a defendant's sixth amendment right of confrontation and cross-examination was more important than a state privilege for juvenile records. The Court acknowledged the high degree of importance of the privilege, but held that it must yield to a defendant's legitimate assertion of an inconsistent constitutional right.107 In United States v. Nixon,108 the Court had to decide between a general claim of executive privilege and the "fundamental demands of due process." 109 The Supreme Court held that the Watergate defendants' need for the information was more important than the general assertion of privilege.110

## A2 Peremptory Challenge

### Aff Does Not Limit PCs

#### Peremptory challenges are not constitutionally protected unless they eliminate a juror because they are biased – the aff only eliminates discriminatory challenges – if the challenge was actually needed for a fair jury the client would be allowed to use them

Barry 01 [Barry, Kathryn Ann (J.D. candidate. Boalt Hall School of Law, University of California at Berkeley). "Striking back against homophobia: Prohibiting peremptory strikes based on sexual orientation." 16 Berkeley Women's L.J. (2001): 157. ALL BRACKETS IN THE ORIGINAL TEXT] AJ

The courts allow attorneys to use peremptory strikes to exclude individuals from the jury when the attorney believes the juror will be biased but is unable to cite a persuasive reason.26 However, as the U.S. Supreme Court explained, "Although peremptory challenges are valuable tools in jury trials, they 'are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.' ', 7 The state is responsible for ensuring that each of its citizens receives a fair trial and the "sole purpose [of a peremptory challenge] is to permit litigants to assist the government in the selection of an impartial trier of fact."8 Through peremptory strikes, attorneys try to eliminate jurors who have individual biases that will affect the jurors' ability to be impartial.

### Limiting PCs OK

#### The Supreme Court does not object to limiting the challenge – proven by a litany of past rulings

Broderick 92 [(Raymond, United States federal judge, and the 24th Lieutenant Governor of Pennsylvania) "Why the peremptory challenge should be abolished." Temple L. Rev. 65 (1992): 369.] AJ

In 1986, our Supreme Court in Batson recognized for the first time that peremptory challenges were being used to discriminate in our court rooms im- mune from constitutional scrutiny. 348 In his concurring opinion in Batson, Jus- tice Marshall was the first Supreme Court Justice to point out that the only way to solve the apparent conflicts between the use of peremptory challenges and the constitutional right to equal protection and an impartial jury was to eliminate the peremptory challenge entirely. Justice Marshall stated: The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167-169; Imlay, Federal Jury Refor- mation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in Swain, emphasized that "[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the require- ments of the Fourteenth Amendment and the right to challenge pe- remptorily, the Constitution compels a choice of the former." 380 U.S. at 244, 85 S.Ct. at 849. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases. 349 In its 1990 term, the Supreme Court appears to have paved the way for the total elimination of peremptory challenges. In Powers it extended the Batson limitation on the use of peremptories by holding that a defendant need not be of the same race as the excluded potential juror to challenge race-based use of per- emptories.350 In Edmonson, the Court extended Batson to all civil jury trials.351 Dissenting in Edmonson, Justice Scalia made some cogent observations, even suggesting that an alternative solution to the peremptory's conflicts with constitutional values may be to abolish it. Justice Scalia wrote: Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case. Judging by the number of Batson claims that have made their way even as far as this Court under the pre-Powers regime, it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will certainly suffer. Alternatively, of course, the States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion. 352 Although the Batson regime is certainly preferable to Swain's judicial tolerance of invidious discrimination in the courtroom, Batson and its progeny unquestionably require lawyers and judges to expend increasing amounts of time in litigating whether the reason given by the trial lawyer for striking the potential juror was not a "pretext for discrimination." As Justice Scalia points out, this "sideshow" inevitably detracts from the merits of the case.353 The cost to soci- ety in the use of trial time for procedures which accomplish no justiciable pur- pose, except perhaps to rescue the peremptory from the extinction it deserves, is certainly another reason to abolish peremptory challenges.

### Weighing

#### The Fourteenth Amendment right to equal protection outweighs the right to exercise peremptory challenges

Haven 13 [(Matt, Juris Doctor Candidate 2012, University of Maryland School of Law) “Reaching Batson's Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard” University of Maryland Law Journal of Race, Religion, Gender and Class, ￼Volume 11 Issue 1] AT

To that end, first, although many litigators see peremptory challenges as essential to a jury trial, the fact remains that the use of the peremptory challenge is not a Constitutional right; it is purely statutory.186 On the other hand, the right to have a jury selected pursuant to non-discriminatory criteria is a constitutional right.187 Accordingly, in deciding "between the right to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the [statutory] right to challenge peremptorily, the Constitution compels a choice of the former." 88 Therefore, "the system, not the Constitution, must be changed." 89

## UTIL

## Util K

### Edelman – Extintion Link

#### Notions of preserving some sort of future for our species valorize reproductive, heterogenital sex, while making queer sex meaningless – this impregnates heterosexuality with the future of signification, necessitating violence against queerness.

Edelman 4 (Lee Edelman, Prof. English at Tufts University, “No Future: Queer Theory and the Death Drive,” 2004, pp. 11-13)

Charged, after all, with the task of assuring “that we being dead yet live,” the Child, as if by nature (more precisely, as the promise of a natural transcendence of the limits of nature itself), excludes the very pathos from which the narrator of The Children of Men recoils when comes upon the –nonreproductive “pleasures of the mind and senses.” For the “pathetic” quality he projectively locates in nongenerative sexual enjoyment – enjoyment that he views in the absence of futurity as empty, substitutive, pathological – exposes the fetishistic figurations of the Child that the narrator pits against it as legible in terms of identical to those for which enjoyment without “hope of posterity” so peremptorily dismissed” legible, that is, as nothing more than “pathetic and crumbling defences shored up against our ruins.” How better to characterize the narrative project of Children of Men itself, which ends, as anyone not born yesterday surely expects form the start, with the renewal of our barren and dying race through the miracle of birth? After all, as Walter Wangerin Jr., reviewing the book for the New York Times, approvingly noted in a sentence delicately poised between description and performance of the novel’s pro-creative ideology: “If there is a baby, there is a future, there is redemption.” If, however, there is no baby and in consequence, no future, then the blame must fall on the fatal lure of sterile, narcissistic enjoyments understood as inherently destructive of meaning and therefore as responsible for the undoing of social organization, collective reality, and, inevitably, life itself. Given that the author of The Children of Men, like the parents of mankind’s children, succumbs so completely to the narcissism – all pervasive, self-congratulatory, and strategically misrecognized – that animates pronatalism, why should we be the least bit surprised when her narrator, facing the futureless future, laments, with what we must call as straight face, that “sex totally divorced from procreation has to become almost meaninglessly acrobatic”? Which is, of course, to say no more than that sexual practice will continue to allegorize the vicissitudes of meaning so long as the specifically heterosexual alibi of reproductive necessity obscures the drive beyond meaning driving the machinery of sexual meaningfulness: so long, that is, as the biological fact of heterosexual procreation bestows the imprimatur of meaning-production on heterogenital relations. For the Child, whose mere possibility is enough to spirit away the naked truth of heterosexual sex – impregnating heterosexuality, as it were, with the future of signification by conferring upon it the cultural burden of signifying futurity – figures our identification with an always about-to-be-realized identity. It thus denies the constant threat to the social order of meaning inherent to the structure of Symbolic desire that commits us to pursuing fulfillment by way of a meaning unable, as meaning, either to fulfill us or, in turn, to be fulfilled because unable to close the gap in identity, the division incised by the signifier, that “meaning,” despite itself, means.

## Impact Add-Ons

### War Add-On

#### Challenging heteronormativity simultaneously challenges social constructions of maleness as aggressive which is the root cause of all violence, war, and domination – the alternative alone cannot solve

Tatchell 89 (Peter, Author and Activist, “Gay Liberation is Central to Human Emancipation,” May/June 1989)

Lesbian and gay liberation is therefore truly revolutionary because it specifically rejects the male heterosexual cult of masculine competitiveness, domination and violence. Instead, it affirms the worthwhileness of male sensitivity and affection between men and, in the case of lesbians, the intrinsic value of an eroticism and love independent of heterosexual men. By challenging heterosexual masculinity, the politics of lesbian and gay liberation has profound radical implications for oppressed peoples everywhere: it actively subverts the male heterosexual machismo' values which lie at the heart of all systems of domination, exploitation and oppression. Lesbian and gay liberation is therefore not an issue which is peripheral. It is, indeed absolutely central to revolutionary change and human liberation in general. Without the successful construction of a cult of heterosexual masculinity and a mass of aggressive male egos, neither sexual, class, racial, species, nor imperialist oppression are possible. All these different forms of oppression depend on two factors for their continued maintenance. First, on specific economic and political structures. And second, on a significant proportion of the population, mainly heterosexual men, being socialised into the acceptance of harsh masculine values which involve the legitimisation of aggression and the suppression of gentleness and emotion. The embracing of these culturally-conditioned macho values, whether consciously or unconsciously, is what makes so many millions of people able to participate in repressive regimes. (This interaction between social structures, ideology and individual psychology was a thesis which the communist psychologist, Wilhelm Reich, was attempting to articulate nearly 60 years ago in his book, The Mass Psychology of Fascism). In the case of German fascism, what Nazism did was merely awake and excite the latent brutality which is intrinsic to heterosexual masculinity in class societies. It then systematically manipulated and organised this unleashed masculine violence into a fascist regime of terror and torture which culminated in the holocaust. Since it is the internalisation of the masculine cult of toughness and domination which makes people psychologically suited and willing to be part of oppressive relations of exploitation and subjection, repressive states invariably glorify masculine "warrior" ideals and legally and ideologically suppress those men - mainly homosexuals - who fail to conform to them. Given that this internalisation of masculine aggression within the male population is a prerequisite for injustice and tyranny, love and tenderness between men ceases to be a purely private matter or simply a question of personal lifestyle. Instead, it objectively becomes an act of subversion which undermines the very foundations of oppression. Hence the Nazi’s vilification of gay men as "sexual subversives" and "sexual saboteurs" who, in the words of Heinrich Himmler, had to be "exterminated- root and branch." In conclusion: the goal of eradicating injustice and exploitation requires us to change both the social structure and the individual personality to create people who, liberated from masculinity, no longer psychologically crave the power to dominate and exploit others and who are therefore unwilling to be the agents of oppressive regimes (whether as soldiers, police, gaolers and censors or as routine civil servants and state administrators who act as the passive agents of repression by keeping the day-to-day machinery of unjust government ticking over). By challenging the cult of heterosexual masculinity, lesbian and gay liberation politics is about much more than the limited agenda of human rights. It offers a unique and revolutionary contribution to the emancipation of the whole of humanity from all forms of oppression and subjugation.

#### Our focus on masculine aggression that causes war is more accurate and more productive – war is produced by larger narratives of militarism, not concrete events – their evidence fails to isolate the real causes of war which also means they have no impact

Cuomo 96 (Chris J. Cuomo 1996, “War is not just an event: Reflections on the significance of everyday violence,” 1996, Hypatia, Volume 11, No. 4, pg 1, proquest.)

Philosophical attention to war has typically appeared in the form of justifications for entering into war, and over appropriate activities within war. The spatial metaphors used to refer to war as a separate, bounded sphere indicate assumptions that war is a realm of human activity vastly removed from normal life, or a sort of happening that is appropriately conceived apart from everyday events in peaceful times. Not surprisingly, most discussions of the political and ethical dimensions of war discuss war solely as an event--an occurrence, or collection of occurrences, having clear beginnings and endings that are typically marked by formal, institutional declarations. As happenings, wars and military activities can be seen as motivated by identifiable, if complex, intentions, and directly enacted by individual and collective decision-makers and agents of states. But many of the questions about war that are of interest to feminists---including how large-scale, state-sponsored violence affects women and members of other oppressed groups; how military violence shapes gendered, raced, and nationalistic political realities and moral imaginations; what such violence consists of and why it persists; how it is related to other oppressive and violent institutions and hegemonies--cannot be adequately pursued by focusing on events. These issues are not merely a matter of good or bad intentions and identifiable decisions. In "Gender and 'Postmodern' War," Robin Schott introduces some of the ways in which war is currently best seen not as an event but as a presence (Schott 1995). Schott argues that postmodern understandings of persons, states, and politics, as well as the high-tech nature of much contemporary warfare and the preponderance of civil and nationalist wars, render an event-based conception of war inadequate, especially insofar as geer is taken into account. In this essay, I will expand upon her argument by showing that accounts of war that only focus on events are impoverished in a number of ways, and therefore feminist consideration of the political, ethical, and ontological dimensions of war and the possibilities for resistance demand a much more complicated approach. I take Schott's characterization of war as presence as a point of departure, though I am not committed to the idea that the constancy of militarism, the fact of its omnipresence in human experience, and the paucity of an event-based account of war are exclusive to contemporary postmodern or postcolonial circumstances.1Theory that does not investigate or even notice the omnipresence of militarism cannot represent or address the depth and specificity of the everyday effects of militarism on women, on people living in occupied territories, on members of military institutions, and on the environment. These effects are relevant to feminists in a number of ways because military practices and institutions help construct gendered and national identity, and because they justify the destruction of natural nonhuman entities and communities during peacetime. Lack of attention to these aspects of the business of making or preventing military violence in an extremely technologized world results in theory that cannot accommodate the connections among the constant presence of militarism, declared wars, and other closely related social phenomena, such as nationalistic glorifications of motherhood, media violence, and current ideological gravitations to military solutions for social problems. Ethical approaches that do not attend to the ways in which warfare and military practices are woven into the very fabric of life in twenty-first century technological states lead[ing] to crisis-based politics and analyses. For any feminism that aims to resist oppression and create alternative social and political options, crisis-based ethics and politics are problematic because they distract attention from the need for sustained resistance to the enmeshed, omnipresent systems of domination and oppression that so often function as givens in most people's lives. Neglecting the omnipresence of militarism allows the false belief that the absence of declared armed conflicts is peace, the polar opposite of war. It is particularly easy for those whose lives are shaped by the safety of privilege, and who do not regularly encounter the realities of militarism, to maintain this false belief. The belief that militarism is an ethical, political concern only regarding armed conflict, creates forms of resistance to militarism that are merely exercises in crisis control. Antiwar resistance is then mobilized when the "real" violence finally occurs, or when the stability of privilege is directly threatened, and at that point it is difficult not to respond in ways that make resisters drop all other political priorities. Crisis-driven attention to declarations of war might actually keep resisters complacent about and complicitous in the general presence of global militarism. Seeing war as necessarily embedded in constant military presence draws attention to the fact that horrific, state-sponsored violence is happening nearly all over, all of the time, and that it is perpetrated by military institutions and other militaristic agents of the state. Moving away from crisis-driven politics and ontologies concerning war and military violence also enables consideration of relationships among seemingly disparate phenomena, and therefore can shape more nuanced theoretical and practical forms of resistance. For example, investigating the ways in which war is part of a presence allows consideration of the relationships among the events of war and the following: how militarism is a foundational trope in the social and political imagination; how the pervasive presence and symbolism of soldiers/warriors/patriots shape meanings of gender; the ways in which threats of state-sponsored violence are a sometimes invisible/sometimes bold agent of racism, nationalism, and corporate interests; the fact that vast numbers of communities, cities, and nations are currently in the midst of excruciatingly violent circumstances. It also provides a lens for considering the relationships among the various kinds of violence that get labeled "war."

### Dualism Add-On

#### Dualism link

#### The endpoint of dualism is nuclear war and ecocide

Mack 91 (John E. Mack, M.D., Psychiatry @ Harvard, 1991 (ReVision Magazine, Fall 1991, Vol. 14, no. 2, p. 108-110)

In order to carry forward my argument, I will try to define the dominant Western view of reality in my own words, appreciating that this may be an oversimplification. The two pillars of this world view are materialism and mental dualism. According to the materialistic conviction, all that exists outside ourselves is the physical or “material” world apprehended by our senses. Everything other than this “objective” reality is “subjective,” that is, belongs to the realm of feeling, the psyche, the spirit, or something similar. Mental dualism is the ability of the psyche to experience separateness and difference, beginning with the distinction between the psyche itself and the material world. Dualistic thinking is characterized by the dichotomizing tendencies that we take for granted, such as stereotyping, the pairs of opposite words and phrases like good and evil, or black and white, that fill our language, and the insistence of parents that children learn to distinguish what is “real” from the products of their imaginations. The materialist/dualist version of reality has proved useful for Western society in its attempts to dominate the material world, other peoples, and nature. This philosophy has also led us to the brink of nuclear war — the ultimate expression of self-other division — and the extinction of many of the planet's many life forms, as human beings pursue their own material well-being at the expense of weaker humans, other animals, and plants. The Western world view is, however, under assault due to a number of scientific discoveries. These include research that has demonstrated the paradoxical and probabilistic ambiguities of matter and energy at the subatomic level, and contemporary studies of human consciousness that have shown us that what we have previously accepted as “reality” is but one of a virtually infinite number of ways of constructing or experiencing existence. It is a curious fact, perhaps reflective of the operation of some sort of universal intelligence, that the assault upon the Western world view is both scientific and exigent in nature. The Western view is contradicted by new knowledge of the physical world and the nature of the psyche, whereas the simultaneous urge to reject that view is demonstrative of imperative need in the face of the planetary crisis that humans have caused. It is as if our minds are being opened to new realities in some sort of synchrony with the conscious and unconscious, individual and collective, perception that we cannot go on as we have been without destroying life itself. Science, need, pragmatism, and morality have all fused. The established version of reality no longer “works” in all the operational and normative senses of that word. Stated more positively, facts that we are discovering about nature, and ourselves in nature, seem to correspond to the knowledge that will be required to preserve life and well-being on the planet. The new paradigm emerging from the current discoveries of laboratory science and consciousness research is in some ways embarrassingly old and familiar. This model embraces truths known to virtually all past cultures and most contemporary societies, however much the latter may be influenced by materialism and dualism in their pursuit of modernization, political power, and market advantage. How we in the West could have succeeded in forgetting this knowledge is one of the great untold stories of our time. Essentially what we are relearning is that intelligence and connection are pervasive, not only on this planet, but throughout the universe, and that complex relationships exist in the cosmos, ones that we are only beginning to grasp. Whether or not we accept the holographic model (the idea that the whole is contained in each part) of the universe, it seems clear that the universe functions like a vast, interconnected information system, in which an action or thought occurring in one part has an unpredictable effect upon other dimensions of the system. The central tasks confronting humankind at this critical juncture are to limit our destructiveness, to learn to live harmoniously in the natural world, and to discover the appropriate outlets for our remarkable creative energies. We will also need to cultivate, really to liberate, those capabilities of the psyche that allow us to experience the numinous in nature and to perceive realities beyond the empirically observable physical world.

### Ontological Security Add-On

#### Heteronormativity instills a fundamental fear of impurity in society – this places our species on a trajectory towards omnicide.

Sedwick 90 (Eve Sedgwick, Professor of English CUNY, “Epistemology of the Closet,” 1990, pp. 127-130.)

From at least the biblical story of Sodom and Gomorray, scenarios of same-sex desire would seem to have had a privileged, though by no means an exclusive, relation in Western culture to scenarios of both genocide and omnicide. That sodomy, the name by which homosexual acts are known even today to the law of half of the United States and to the Supreme Court of all of them, should already be inscribed with the name of a site of mass extermination is the appropriate trace of a double history. In the first place there is a history of the mortal suppression, legal or subjudicial, of gay acts and gay people, through burning, hounding, physical and chemical castration, concentration camps, bashing--the array of sanctioned fatalities that Louis Crompton records under the name of gay genocide, and whose supposed eugenic motive becomes only the more colorable with the emergence of a distinct, naturalized minority identity in the nineteenth century. In the second place, though, there is the inveterate topos of associating gay acts or persons with fatalities vastly broader than their own extent: if it is ambiguous whether every denizen of the obliterated Sodom was a sodomite, clearly not every Roman of the late Empire can have been so, despite Gibbon's connecting the eclipse of the whole people to the habits of a few. Following both Gibbon and the Bible, moreover, with an impetus borrowed from Darwin, one of the few areas of agreement among modern Marxist, Nazi, and liberal capitalist ideologies is that there is a peculiarly close, though never precisely defined, affinity between same-sex desire and some historical condition of moribundity, called "decadence," to which not individuals or minorities but whole civilizations are subject. Bloodletting on a scale more massive by orders of magnitude than any gay minority presence in the culture is the "cure," if cure there be, to the mortal illness of decadence. If a fantasy trajectory, utopian in its own terms, toward gay genocide has been endemic in Western culture from its origins, then, it may also have been true that the trajectory toward gay genocide was never clearly distinguishable from a broader, apocalyptic trajectory toward something approaching omnicide. The deadlock of the past century between minoritizing and universalizing understandings of homo/heterosexual definition can only have deepened this fatal bond in the heterosexist \*imaginaire\*. In our culture as in \*Billy Bud\*, the phobic narrative trajectory toward imagining a time \*after the homosexual\* is finally inseparable from that toward imagining a time \*after the human\*; in the wake of the homosexual, the wake incessantly produced since first there \*were\* homosexuals, every human relation is pulled into its shining representational furrow. Fragments of visions of a time “after the homosexual” are, of course, currently in dizzying circulation in our culture [book published in 1990 -Alec]. One of the many dangerous ways that AIDS discourse seems to ratify and amplify preinscribed homophobic mythologies is in its pseudo-evolutionary presentation of male homosexuality as a stage doomed to extinction (read, a phase the species is going through) on the enormous scale of whole populations.26 The lineaments of openly genocidal malice behind this fantasy appear only occasionally in the respectable media, though they can be glimpsed even there behind the poker-face mask of our national experiment in laissez-faire medicine. A better, if still deodorized, whiff of that malice comes from the famous pronouncement of Pat Robertson: "AIDS is God's way of weeding his garden." The saccharine lustre this dictum gives to its vision of devastation, and the ruthless prurience with which it misattributes its own agency, cover a more fundamental contradiction: that, to rationalize complacent glee at a spectacle of what is imagined as genocide, a proto-Darwinian process of natural selection is being invoked--in the context of a Christian fundamentalism that is not only antievolutionist but recklessly oriented toward universal apocalypse. A similar phenomenon, also too terrible to be noted as a mere irony, is how evenly our culture's phobia about HIV-positive blood is kept pace with by its rage for keeping that dangerous blood in broad, continuous circulation. This is evidenced in projects for universal testing, and in the needle-sharing implicit in William Buckley's now ineradicable fantasy of tattooing HIV-positive persons. But most immediately and pervasively it is evidenced in the literal bloodbaths that seem to make the point of the AIDS-related resurgence in violent bashings of gays--which, unlike the gun violence otherwise ubiquitous in this culture, are characteristically done with two-by-fours, baseball bats, and fists, in the most literal-minded conceivable form of body-fluid contact. It might be worth making explicit that the use of evolutionary thinking in the current wave of utopian/genocidal fantasy is, whatever else it may be, crazy [sic]. Unless one believes, first of all, that same-sex object-choice across history and across cultures is \*one thing\* with \*one cause\*, and, second, that its one cause is direct transmission through a nonrecessive genetic path--which would be, to put it gently, counter-intuitive--there is no warrant for imagining that gay populations, even of men, in post-AIDS generations will be in the slightest degree diminished. Exactly \*to the degree\* that AIDS is a gay disease, it's a tragedy confined to our generation; the long-term demographic depredations of the disease will fall, to the contrary, on groups, many themselves direly endangered, that are reproduced by direct heterosexual transmission. Unlike genocide directed against Jews, Native Americans, Africans, or other groups [the disabled -Alec], then, gay genocide, the once-and-for-all eradication of gay populations, however potent and sustained as a project or fantasy of modern Western culture, is not possible short of the eradication of the whole human species. The impulse of the species toward its own eradication must not either, however, be underestimated. Neither must the profundity with which that omnicidal impulse is entangled with the modern problematic of the homosexual: the double bind of definition between the homosexual, say, as a distinct \*risk group\*, and the homosexual as a potential of representation within the universal.27 As gay community and the solidarity and visibility of gays as a minority population are being consolidated and tempered in the forge of this specularized terror and suffering, how can it fail to be all the more necessary that the avenues of recognition, desire, and thought between minority potentials and universalizing ones by opened and opened and opened?

## A2 DAs

### A2 Court Clog DA

#### Turn – the large number of peremptories leads to court clog

Carroll 9\* [(JAMESON B. CARROLL, trial and litigation attorney at Carroll & Weiss in Atlanta, Georgia; WILLIAM A. FIXEL, attorney with Fixel & Willis in Tallahassee and graduate of the University of Virginia School of Law; WILLIAM MEYER, Partner in the International Practice of Smith, Gambrell & Russell, LLP; and LAURA GARY, licensed to practice law in GA since 2008) “Striking Back Against Peremptory Strikes” American Bar Association. \*No date – 09 is last date cited] AT

Litigants are not the only ones paying for peremptory-fueled delays. Taxpayers do too. This harm is magnified by the “litigation explosion” of the last two decades.12 There has been a dramatic rise in per capita case filings, with federal civil case filings growing at roughly twice the rate of the national population from the period 1993-2002.13 At a time when dockets should be moving faster, they move more slowly because of peremptory challenges: More potential jurors must be called in order to account for the peremptory challenges allowed each party -- and inevitably, each party uses all the challenges allotted

# K Stuff

## General K Stuff

### 1AC is Productive

#### Discussing the harms is key to resisting it

Clements 13 [(Angela, J.D. (2009), UC Berkeley School of Law) “Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII” Berkeley Journal of Gender, Law & Justice, Volume 24 Issue 2 Article 2] AT

Part III contends that the harms associated with gender identity discrimination are real and pervasive for lesbian and gay workers. Given this reality, it is critical to reevaluate traditional political and legal frameworks that assume discrimination faced by lesbian and gay workers is solely an issue of sexual orientation rather than also one of gender identity. Part III begins this reevaluation by articulating the harms associated with trait-based discrimination in other contexts, particularly race and national origin, and emphasizes that current antidiscrimination doctrine does not adequately alleviate those harms. Part III then draws parallels to the harms associated with similar types of trait-based discrimination against lesbian and gay discrimination based on gender nonconforming traits. Because traits that some courts are likely to classify as volitional may be central to many lesbian and gay people's identities, advocates must work to enact strong and effective legislation that reaches discrimination based on these traits. To accomplish this goal, I contend that advocates must engage in a more honest assessment of the harms to lesbian and gay people who face prejudice on the basis of gender identity in addition to the threat of sexual orientation discrimination. Without engaging in this assessment there is a real danger that courts will view these harms as de minimis, as they do in other antidiscrimination contexts.28 Part III concludes that this assessment is especially needed in light of attitudes and trends among a younger generation of LGBT people, who is increasingly hold gender identity and sexual orientation as distinct and equally important identities.

### Root Cause

#### Challenging heteronormativity simultaneously challenges social constructions of maleness as aggressive which is the root cause of all violence, war, and domination – the alternative alone cannot solve

Tatchell 89 (Peter, Author and Activist, “Gay Liberation is Central to Human Emancipation,” May/June 1989)

Lesbian and gay liberation is therefore truly revolutionary because it specifically rejects the male heterosexual cult of masculine competitiveness, domination and violence. Instead, it affirms the worthwhileness of male sensitivity and affection between men and, in the case of lesbians, the intrinsic value of an eroticism and love independent of heterosexual men. By challenging heterosexual masculinity, the politics of lesbian and gay liberation has profound radical implications for oppressed peoples everywhere: it actively subverts the male heterosexual machismo' values which lie at the heart of all systems of domination, exploitation and oppression. Lesbian and gay liberation is therefore not an issue which is peripheral. It is, indeed absolutely central to revolutionary change and human liberation in general. Without the successful construction of a cult of heterosexual masculinity and a mass of aggressive male egos, neither sexual, class, racial, species, nor imperialist oppression are possible. All these different forms of oppression depend on two factors for their continued maintenance. First, on specific economic and political structures. And second, on a significant proportion of the population, mainly heterosexual men, being socialised into the acceptance of harsh masculine values which involve the legitimisation of aggression and the suppression of gentleness and emotion. The embracing of these culturally-conditioned macho values, whether consciously or unconsciously, is what makes so many millions of people able to participate in repressive regimes. (This interaction between social structures, ideology and individual psychology was a thesis which the communist psychologist, Wilhelm Reich, was attempting to articulate nearly 60 years ago in his book, The Mass Psychology of Fascism). In the case of German fascism, what Nazism did was merely awake and excite the latent brutality which is intrinsic to heterosexual masculinity in class societies. It then systematically manipulated and organised this unleashed masculine violence into a fascist regime of terror and torture which culminated in the holocaust. Since it is the internalisation of the masculine cult of toughness and domination which makes people psychologically suited and willing to be part of oppressive relations of exploitation and subjection, repressive states invariably glorify masculine "warrior" ideals and legally and ideologically suppress those men - mainly homosexuals - who fail to conform to them. Given that this internalisation of masculine aggression within the male population is a prerequisite for injustice and tyranny, love and tenderness between men ceases to be a purely private matter or simply a question of personal lifestyle. Instead, it objectively becomes an act of subversion which undermines the very foundations of oppression. Hence the Nazi’s vilification of gay men as "sexual subversives" and "sexual saboteurs" who, in the words of Heinrich Himmler, had to be "exterminated- root and branch." In conclusion: the goal of eradicating injustice and exploitation requires us to change both the social structure and the individual personality to create people who, liberated from masculinity, no longer psychologically crave the power to dominate and exploit others and who are therefore unwilling to be the agents of oppressive regimes (whether as soldiers, police, gaolers and censors or as routine civil servants and state administrators who act as the passive agents of repression by keeping the day-to-day machinery of unjust government ticking over). By challenging the cult of heterosexual masculinity, lesbian and gay liberation politics is about much more than the limited agenda of human rights. It offers a unique and revolutionary contribution to the emancipation of the whole of humanity from all forms of oppression and subjugation.

### Materialism – General

#### Only constructive action that starts with material reform can be effective – academic criticism locks us in abstractions that fail to solve real oppression – turn the kritik since it satisfies people with ineffectual academic criticism without actually doing anything

Bryant 12 (levi, prof of philosophy at Collins college, Critique of the Academic Left, http://larvalsubjects.wordpress.com/2012/11/11/underpants-gnomes-a-critique-of-the-academic-left/)

The problem as I see it is that this is the worst sort of abstraction (in the Marxist sense) and wishful thinking. Within a Marxo-Hegelian context, a thought is abstract when it ignores all of the mediations in which a thing is embedded. For example, I understand a robust tree abstractly when I attribute its robustness, say, to its genetics alone, ignoring the complex relations to its soil, the air, sunshine, rainfall, etc., that also allowed it to grow robustly in this way. This is the sort of critique we’re always leveling against the neoliberals. They are abstract thinkers. In their doxa that individuals are entirely responsible for themselves and that they completely make themselves by pulling themselves up by their bootstraps, neoliberals ignore all the mediations belonging to the social and material context in which human beings develop that play a role in determining the vectors of their life. They ignore, for example, that George W. Bush grew up in a family that was highly connected to the world of business and government and that this gave him opportunities that someone living in a remote region of Alaska in a very different material infrastructure and set of family relations does not have. To think concretely is to engage in a cartography of these mediations, a mapping of these networks, from circumstance to circumstance (what I call an “onto-cartography”). It is to map assemblages, networks, or ecologies in the constitution of entities.¶ Unfortunately, the academic left falls prey to its own form of abstraction. It’s good at carrying out critiques that denounce various social formations, yet very poor at proposing any sort of realistic constructions of alternatives. This because it thinks abstractly in its own way, ignoring how networks, assemblages, structures, or regimes of attraction would have to be remade to create a workable alternative. Here I’m reminded by the “underpants gnomes” depicted in South Park:¶ The underpants gnomes have a plan for achieving profit that goes like this:¶ Phase 1: Collect Underpants¶ Phase 2: ?¶ Phase 3: Profit!¶ They even have a catchy song to go with their work:¶ Well this is sadly how it often is with the academic left. Our plan seems to be as follows:¶Phase 1: Ultra-Radical Critique¶Phase 2: ?¶Phase 3: Revolution and complete social transformation!¶Our problem is that we seem perpetually stuck at phase 1 without ever explaining what is to be done at phase 2. Often the critiques articulated at phase 1 are right, but there are nonetheless all sorts of problems with those critiques nonetheless. In order to reach phase 3, we have to produce new collectives. In order for new collectives to be produced, people need to be able to hear and understand the critiques developed at phase 1. Yet this is where everything begins to fall apart. Even though these critiques are often right, we express them in ways that only an academic with a PhD in critical theory and post-structural theory can understand. How exactly is Adorno to produce an effect in the world if only PhD’s in the humanities can understand him? Who are these things for? We seem to always ignore these things and then look down our noses with disdain at the Naomi Kleins and David Graebers of the world. To make matters worse, we publish our work in expensive academic journals that only universities can afford, with presses that don’t have a wide distribution, and give our talks at expensive hotels at academic conferences attended only by other academics. Again, who are these things for? Is it an accident that so many activists look away from these things with contempt, thinking their more about an academic industry and tenure, than producing change in the world? If a tree falls in a forest and no one is there to hear it, it doesn’t make a sound! Seriously dudes and dudettes, what are you doing?¶ But finally, and worst of all, us Marxists and anarchists all too often act like assholes. We denounce others, we condemn them, we berate them for not engaging with the questions we want to engage with, and we vilify them when they don’t embrace every bit of the doxa that we endorse. We are every bit as off-putting and unpleasant as the fundamentalist minister or the priest of the inquisition (have people yet understood that Deleuze and Guattari’s Anti-Oedipus was a critique of the French communist party system and the Stalinist party system, and the horrific passions that arise out of parties and identifications in general?). This type of “revolutionary” is the greatest friend of the reactionary and capitalist because they do more to drive people into the embrace of reigning ideology than to undermine reigning ideology. These are the people that keep Rush Limbaugh in business. Well done!¶ But this isn’t where our most serious shortcomings lie. Our most serious shortcomings are to be found at phase 2. We almost never make concrete proposals for how things ought to be restructured, for what new material infrastructures and semiotic fields need to be produced, and when we do, our critique-intoxicated cynics and skeptics immediately jump in with an analysis of all the ways in which these things contain dirty secrets, ugly motives, and are doomed to fail. How, I wonder, are we to do anything at all when we have no concrete proposals? We live on a planet of 6 billion people. These 6 billion people are dependent on a certain network of production and distribution to meet the needs of their consumption. That network of production and distribution does involve the extraction of resources, the production of food, the maintenance of paths of transit and communication, the disposal of waste, the building of shelters, the distribution of medicines, etc., etc., etc.¶ What are your proposals? How will you meet these problems? How will you navigate the existing mediations or semiotic and material features of infrastructure? Marx and Lenin had proposals. Do you? Have you even explored the cartography of the problem? Today we are so intellectually bankrupt on these points that we even have theorists speaking of events and acts and talking about a return to the old socialist party systems, ignoring the horror they generated, their failures, and not even proposing ways of avoiding the repetition of these horrors in a new system of organization. Who among our critical theorists is thinking seriously about how to build a distribution and production system that is responsive to the needs of global consumption, avoiding the problems of planned economy, ie., who is doing this in a way that gets notice in our circles? Who is addressing the problems of micro-fascism that arise with party systems (there’s a reason that it was the Negri & Hardt contingent, not the Badiou contingent that has been the heart of the occupy movement). At least the ecologists are thinking about these things in these terms because, well, they think ecologically. Sadly we need something more, a melding of the ecologists, the Marxists, and the anarchists. We’re not getting it yet though, as far as I can tell. Indeed, folks seem attracted to yet another critical paradigm, Laruelle.¶ I would love, just for a moment, to hear a radical environmentalist talk about his ideal high school that would be academically sound. How would he provide for the energy needs of that school? How would he meet building codes in an environmentally sound way? How would she provide food for the students? What would be her plan for waste disposal? And most importantly, how would she navigate the school board, the state legislature, the federal government, and all the families of these students? What is your plan? What is your alternative? I think there are alternatives. I saw one that approached an alternative in Rotterdam. If you want to make a truly revolutionary contribution, this is where you should start. Why should anyone even bother listening to you if you aren’t proposing real plans? But we haven’t even gotten to that point. Instead we’re like underpants gnomes, saying “revolution is the answer!” without addressing any of the infrastructural questions of just how revolution is to be produced, what alternatives it would offer, and how we would concretely go about building those alternatives. Masturbation.¶ “Underpants gnome” deserves to be a category in critical theory; a sort of synonym for self-congratulatory masturbation. We need less critique not because critique isn’t important or necessary– it is –but because we know the critiques, we know the problems. We’re intoxicated with critique because it’s easy and safe. We best every opponent with critique. We occupy a position of moral superiority with critique. But do we really do anything with critique? What we need today, more than ever, is composition or carpentry. Everyone knows something is wrong. Everyone knows this system is destructive and stacked against them. Even the Tea Party knows something is wrong with the economic system, despite having the wrong economic theory. None of us, however, are proposing alternatives. Instead we prefer to shout and denounce. Good luck with that.

### Materialism – Reps Specific

#### Reps focus fails – material change are the underlying structures

Dewsbury 3 - John-David Dewsbury, School of Geographical Studies, University of Bristol, 2k3 [Environment and Planning A, volume 35, pages 1907-1932, http://www.sages.unimelb.edu.au/news/mhgr/dewsbury.pdf]

That someone includes us -- the social scientists, the researchers, and the writers. In some way we are all false witnesses to what is there.(2) So, even though the philosophical drive moves against the apparently sterile setup of totalizing representations, the presentation of ideas is trapped within the structure it is trying to critique. In my opinion, this sterility is only apparent. Significantly, this appearance is valid from both sides: from the side of representational theory because of the belief in the representational structure as being able to give an account of everything; and from the side of nonrepresentational theory because of the danger of getting carried away with an absolute critique of representations. The apparent sterility comes from this last point: that in getting carried away with critique you fail to appreciate that the building blocks of representation are not sterile in themselves -- only when they are used as part of a system. The representational system, its structure and regulation of meaning, is not complete -- it needs constant maintenance, loyalty, and faith from those who practice it. In this regard, its power is in its pragmatic functions: easy communication of ideas (that restricts their potential extension), and sustainable, defensible, and consensual agreement on understanding (a certain kind of understanding, and hence a certain type of knowledge). The nonrepresentational argument comes into its own in asking us to revisit the performative space of representation in a manner that is more attuned to its fragile constitution. The point being that representation left critically unattended only allows for conceptual difference and not for a concept of difference as such. The former maintains existing ideological markers whilst the latter challenges us to invent new ones. For me, the project of nonrepresentational theory then, is to excavate the empty space between the lines of representational meaning in order to see what is also possible. The representational system is not wrong: rather, it is the belief that it offers complete understanding -- and that onlyit offers any sensible understanding at all -- that is critically flawed.

## A2 Race Ks

### Intersectionality

#### Racism is best understood through a lens of heteronormativity

Ferguson 2000 [(Roderick, professor of race and critical theory in the American Studies Department at the University of Minnesota, Twin Cities) “The nightmares of the heteronormative” Cultural Values Volume 4, Issue 4, 2000] AT

Race and sexuality have always intersected in African-American racial formation. In this article, I argue that this intersection has inspired certain epistemological, political, economic and cultural formations. In terms of epistemology, American sociology and African-American literature have historically addressed the connections between race and sexuality. Both were interested in the ways that African-American racial formation transgressed ideal heterosexual and patriarchal boundaries. As far as cultural formations were concerned, such transgressions materially and symbolically aligned African-American racial formation with homosexuality. Attending to the political and economic effect of this alignment, I maintain that it helped to articulate African-American racial difference and worked to exclude African-American from the privileges of state and capital. Thus, the article argues that African-American racial subordination can best be understood as it converges with heteronormative and patriarchal modes of regulation and exclusion. After showing how the most prominent sociology during the 1940s (Gunnar Myrdal's American Dilemma: The Negro and American Democracy) marked African-American as pathologically heterosexual, I go on to read James Baldwin's Go Tell It on the Mountain to determine how the alignment between blackness and homosexuality suggests alternative and oppositional epistemological, cultural and political practices.

## A2 Essentialism

### Link Debate

#### We link turn it

Clements 13 [(Angela, J.D. (2009), UC Berkeley School of Law) “Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII” Berkeley Journal of Gender, Law & Justice, Volume 24 Issue 2 Article 2] AT

Expanding antidiscrimination law to encompass more trait discrimination claims raises valid concerns about line-drawing (that is, which traits to protect) and about reinforcing group-based stereotypes that essentialize identity. 20 2 However, advocating for statutory provisions that separately protect gender identity and sexual orientation would instead seem to lessen the risk of essentialism. This is because disaggregating gender nonconformity and lesbian and gay identity eliminates the need to rely on stereotypes about "gay" or "lesbian" traits in order to find an inference of discrimination.

#### No link – our argument is not that all sexual or gender minorities share any innate characteristics, instead it’s that many share the perspective of being a sexual minority and being discriminated against – that was clear in the tag of the Burkey evidence. Opposing this viewpoint denies that they experience oppression – essentialism might be bad but perpetuating heternormativity is worse since

#### The Elias evidence – proves heteronormativity allows the classification of minorities as deviant and unhuman necessitating exclusionary violence which is worse than homogenizing a group

#### Root cause – heternormativity contains within it the idea that all sexual minorities are the same which is an impact to essentialism – that means we co-opt their impact

### A2 Tatchell Link

#### You misunderstand our argument – the argument is that the association of maleness and aggression are socially constructed, not innate – that’s exactly why it’s possible to challenge them

# T/Theory Frontlines

## General

### Aff Reasonability + Disclosure

#### You should be hugely skeptical of topicality arguments against disclosed affs – this severely mitigates claims of predictability since they saw my wiki and could have prepped against it but chose not to – this means all T arguments must be grounded in claims other than predictability

### K

#### Independently, this discussion is vitally important – prefer T interps that allow us to discuss discrimination in the jury system – all the evidence from the aff proves this is a huge issue – discussing this issue in debate is key to challenge the heteronormative structures that pervade society.

Elias 3 (John Elias, Professor at San Francisco University, Journal of Homosexuality, Vol. 45, no. 2/3/4, p. 64, 2003)

Akin to organized religion and the biomedical field, the educational system has been a major offender. Wedded to disseminating the idea that heterosexuality is the ultimate and best form of sexuality, “Schools have maintained, by social custom and with reinforcement from the law, the promotion of the heterosexual family as predominant, and therefore the essence of normal. From having been presumed to be ‘normal,’ heterosexual behavior has gained status as the right, good, and ideal lifestyle” (Leck, 1999, p. 259). School culture in general is fraught with heteronormativity. Our society has long viewed queer sexualities as “. . . deviant, sinful, or both, and our schools are populated by adolescent peers and adult educators who share these heterosexual values” (Ginsberg, 1999, p. 55). Simply put, heteronormativity and sexual prejudice pervade the curriculum at the elementary, secondary, and post-secondary levels (for examples of this and ways of intervening, see: Adams, Bell, & Griffin, 1997; Letts & Sears, 1999; Lovaas, Baroudi, & Collins, 2002; Yep, 2002). Besides the hegemonic hold schools have had regarding a heterosexual bias, school culture continues to devote much energy to maintaining “. . . the status quo of our dominant social institutions, which are hierarchical, authoritarian, and unequal, competitive, racist, sexist, and homophobic” (Arnstine, 1995, p. 183). While there has been modest success in addressing various forms of prejudice in schools (Kumashiro, 2001), what is sorely lacking is serious attention to how the intersections of race, class, sexuality and gender are interwoven and dialectically create prejudice (e.g., racism, classism, and hetero[sexism]). Schools would be an ideal site to interrogate, and begin to erode, the kind of hegemony upon which heterosexism rests and is supported. To date, not much is being done in a systematic fashion to disrupt the ways in which U.S. schooling has perpetuated such hierarchies. It seems to me that sexuality education is ripe for the opportunity to challenge heterosexism in school culture; however, public school-based sexuality education is presently in serious crisis, as it has turned mostly to the business of pushing for abstinence- only sexuality education. According to federal legislation, states that accept funding for this form of sexuality education require that young people are taught to abstain from sexual activity until they get married. This has numerous implications for relationship construction; a more in-depth description and analysis of this form of sexuality education will follow later in this essay.

#### Outweighs their impacts

#### Education impacts are tiny – this topic will be over in a few weeks and this aff only affects a few rounds – also the fact that we debate dozens of rounds that are educational means a couple rounds doesn’t derail education

#### Fairness impacts are irrelevant in comparison – they serve no external goal and a high school competition doesn’t affect our lives

#### My impacts are systemic and real – heternormativity is real and actually affects people’s lives in hugely significant ways – it is our obligation to discuss this issue to take an intellectual stance against it

## Extra-T

### I Meets

#### The aff is not extra-topical – here’s the explanation

#### In the status quo, prosecutors are not allowed to exercise racist peremptory challenges, which conflicts with the attorney client privilege and upholds truth-seeking since it forces prosecutors to disclose their clients’ reasoning about choosing juries. The plan expands this ruling to sexual orientation – thus, defendants can not only appeal due to the exclusion of a racial minority juror, but also due to the exclusion of a sexual minority juror. This limits the privilege further by expanding the circumstances in which the attorney must disclose.

#### Every aff works this way – there are already exceptions to the privilege in the status quo, and the aff would expand those exceptions to force attorneys to disclose more information than they currently do

## T-Truth Seeking

### I meet

#### Second contention is about truth seeking – the point is to create an impartial jury

### CI – A2 Fair Trial is Not Truth Seeking

#### Counter-interp – truth seeking is defined by the CESL:

CESL [(China EU School of Law at the China University of Political Science and the Law) “The Search for Truth in Criminal Process” No date] AT

Secondly, it is the competing consensus theory. The competing consensus theories of truth dispense with the notion that "true facts" exist a priori; truth, according to these theories, is what reasonable people agree upon after a complete and fair discourse.8 Procedural truth is implicated in this theory.¶ The different approaches toward truth-finding connected with these competing theories have a direct impact on the function and structure of the criminal process. If truth-finding connotes the revelation (or discovery) of an objective reality, it is the result that legitimizes the process. The judicial process is only the means to discover the hidden, "objective" reality and should be organized to optimize the chances of finding the "piece of gold." If, on the other hand, consensus theory is correct in postulating that whatever emerges from a fair and rational discourse among the parties can be accepted as the "truth," the content of the rules that determine the process becomes more important than the outcome itself, and adherence to these rules acquires paramount importance for truth-finding.9 B. The Relations with Different Procedural Models¶ Traditionally, correspondence theory has been regarded as congruent with inquisitorial procedural systems, whereas the adversarial process prevalent in common law countries has been said to reflect consensus theory. 10If we content ourselves with a very superficial sketch of the two models and disregard their complexities and variants, then the distinctive feature of the adversarial model is the assumption that an antagonistic presentation of competing versions of the "truth" by each party is the optimal device for bringing out the "real" truth. Hence, parties are given the power as well as the responsibility for presenting evidence to prove their respective versions of the truth, and each party is expected to rigorously test the opponent's version through cross-examination.11 In this circumstance, truth is not completely about what has happened in real life, provided it is plausible to laymen and is under the guarantee of reasonable discourse. Most importantly, truth is an outcome after an intense combat between the prosecutor and the defendant.

#### Thus, the truth is not an outcome but a process, and truth-seeking is anything that pursues the goal of improving the accuracy of that process.

### Standard – Seeking is Goal

#### Seeking implies a goal – defined as “attempt to find (something)” by the Oxford dictionary

#### Truth seeking implies a policy intending to find the truth – otherwise the aff is only topical if it actually achieves the truth which is bad for two reasons

#### Destroys aff ground – the aff is not topical if it doesn’t solve which forces me to read solvency even if I have a means-based standard; and the neg can win just by proving the aff doesn’t solve

#### Makes debate logically coherent – the neg’s offense hinges on the aff’s solvency since it forces the aff to be effects topical

## T-ACP

### I Meets

#### I definitely meet – lawyers agree the plan conflicts with the privilege

Juviler 88 [(MICHAEL R, Kings County Judge, Yale University LL.B.) “The People of the State of New York, Plaintiff, v. Cosmo Muriale, Defendant: Supreme Court, Kings County” 138 Misc.2d 1056 (1988)] AT

Defense lawyers have also maintained that requiring them to give racially neutral explanations for peremptory challenges would interfere with the communication between lawyer and client, compel disclosure of trial strategy, prevent the lawyer from honoring the client's wishes to exclude a particular juror, and violate the attorney-client privilege, thereby infringing on the defendant's Sixth Amendment right to the assistance of counsel. Some of these concerns may be reasonable, but they do not justify discriminatory practices in the selection of jurors or entitle the defense to an unfair advantage over the prosecution. Nor would requiring a lawyer to give a racially neutral reason for excusing a juror force the lawyer to disclose a confidence. But if it did, that disclosure would be justified. (See, People v Green, 135 A.D.2d 565 [2d Dept] [attorney-client privilege not violated when defense counsel was required to state whether his client had told him about a statement, because the privilege was waived by the defendant's motion for a new trial].)

### Counter-Interp

#### Counter-interp – Take precedence over is defined as

the right to come before someone or something else; greater importance than someone or something else.

#### The term “right” implies truth-seeking has the ability to come before the privilege – not that it necessarily comes before. Therefore -

#### The plan must be an instance of truth-seeking, but only needs to *potentially* conflict with the privilege, not necessarily conflict in all instances

#### Two standards

#### First, turn ground – their interp requires the aff to violate the privilege in all cases which means I can’t argue the plan promote attorney-client communications, destroying link turn ground – however it’s not reciprocal since the neg can prove the privilege promotes truth-seeking. Turn ground is key to fairness since it ensures I can access offense on neg arguments.

#### Second, predictability –

#### my definition defines “take precedence over” as a phrase, making it the most accurate to define words that have a different meaning together.

#### This comes from the first definition in a dictionary which ranks terms by common usage, which is key to predictability since the way we actually use terms frames how we understand them.

#### Predictability is key to fairness since we have to be able to predict arguments to prep and respond to them.

## T-Effects

### I Meets

#### I meet. My plan text uses a court decision to eliminates attorney client privilege in instances of discriminatory pre-emptory challenges – the lawyers are forced to disclose

### CI vs Appeals Interp

#### Counter-interp. If advocating an exemption to attorney client privilege, the lawyer must disclose the information at the first moment it would be applicable.

#### Prefer—

#### They massively over-limit. Under their interpretation, no affirmative could possibly be topical – by definition, attorney-client privilege isn’t invoked until a lawyer is subpoenaed to testify against a client. Prior to that, disclosure is restricted by confidentiality, not ACP

The State Bar of Arizona 2k [“State Bar of Arizona Ethics Opinions: 00-11: Confidentiality; Subpoenas.” Updated 11/2000. Accessed online 11.21.2013 SW <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=268>]

The Comment to ER 1.6 of the Rules of Professional Conduct, clarifies the distinction between the ethical rule of confidentiality and the substantive law of "attorney-client" privilege:¶ The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness¶ or otherwise required to produce evidence concerning a client. ¶ The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer¶ through compulsion of law. ¶ If a lawyer is called as a witness to give testimony concerning¶ a client, absent waiver by the client, ER 1.6(a) requires the lawyer¶ to invoke the privilege when it is applicable. The lawyer must¶ comply with the final orders of a court or other tribunal of¶ competent jurisdiction requiring the lawyer to give information¶ about the client.

#### Thus, for the aff to defend a restriction on the ACP, they have to defend a procedure by which the defense is forced to disclose information by a court order such as a subpoena or an appeal which is exactly what the plan does.

## Spec Shells

### Grounds Spec

#### I meet – the ruling is on the grounds of the Equal Protections Clause – this was very explicit in the plan text

#### Specifically – here are the precise procedure of the Equal Protections ruling

Tanford 90 [(Alex, Professor of Law and Ira C. Batman Faculty Fellow) “Racism in the Adversary System: The Defendant's Use of Peremptory Challenges” Maurer School of Law: Indiana University Faculty Publications] AT

The analysis begins with the most similar case, Batson v. Ken- tucky, 10 and asks if it was correctly or incorrectly decided under the equal protection clause. The commentators agree that the result in Bat- son was the right one.11 The prosecution was properly prohibited from making race-based peremptory challenges because all four criteria for a successful equal protection claim were satisfied: (1) the African-Ameri- can defendant on trial was a person protected by the equal protection clause; 2 (2) the defendant was a member of a racial minority with standing to object to the state's race-based challenges;' 3 (3) when prosecutors exercise challenges, they engage in state action, 4 so judicial scrutiny is justified; and (4) the state could demonstrate no compelling interest in excluding minorities from jury service.' 5

#### I meet – the ruling would be that the Court expands the ruling in Batson v Kentucky, which is a ruling based on the grounds of the Equal Protections Clause.

### Test Case Spec

#### I meet – the ruling would be a review of the case currently pending in the 9th Circuit Court over Smithkline Beecham Corp. v. Abbott Laboratories.

### O-Spec

## Test Cases Must Already Be Resolved [wip]

## Courts affs bad [wip]

## Plans Bad

### Counter-Interp

#### Counter-interpretation: The aff may parametricize the 2013 November December resolution if all versions of the plan that have been run are disclosed on the NDCA wiki.

#### Net benefits:

#### 1. Limits: Plans solve ambiguity by not aiming for complete CJS overhaul – key to limiting the scope of the debate and preventing explosion of aff ground

Hendrickson 13 [(Ed, ex-LD Debater, Meadows School ’13) “Topic Analysis by Ed Hendrickson” NFL Topic Analysis] AT

Complications with fiat might arise from a lack of a clear actor. We can just assert that the U.S. government does something, but that seems like a superficial response to what is a very challenging question. One might consider fiating with the courts, although the dramatic restructuring necessary to shift the United States criminal justice system to an inquisitorial system instead of an adversarial one seems insurmountable; likewise, fiating legislation that weakens 6th amendment protections to provide a less-than-dependable attorney seems to be more polemical than one might desire. I think that the easiest way to avoid these problems is to write plans that are narrower—instead of attempting to restructure the whole of the criminal justice system, a debater might consider weakening attorney-client privilege to include certain, tangible benefit (e.g. child abuse reporting, not in the case of corporations), while avoiding nebulous generalizations that are just as ambiguous as existing attorney-client relationships. Specificity is actually far better in this case, particularly for the negative. An affirmative which attempts to give too much leeway on what they fiat opens itself up to the criticism that attorney-client privilege was just as ambiguous before the plan as after.

#### 2. Topic breadth: Plan focus discourages generic debates and maximizes the breadth of topical debates. Whole res has literally no educational value since we just repeat the same round over and over again with little to no variation.

#### 3. Aff skew: Even if there’s a risk of offense vote aff to combat structural skews, verified by the massive neg win percentage.

### Education > Fairness

#### Fairness is instrumental: It’s only important as a check on getting education from the round. The purpose of fairness is to maintain the integrity of debate, which is founded in educational value. So the violation to fairness must be so big that we can’t debate in an educational sense.

#### Scope: Even if competitive success is important, the nature of the activity creates very few winners. Education’s value is applicable to every participant in the activity, so it’s the only value the entire activity can recognize.

#### Probability: Education and portable skills will almost certainly be applicable to our daily lives, whereas the outcome of a few rounds is unlikely to affect our long-term life outcomes.

### A2 Ground/Clash

#### No offense for them since aff still conflicts with the ACP. That means virtually all neg arguments will still link – there isn’t a single NC on this topic that doesn’t link. *Neg can still link the Constitution NC and the generic confidentiality NC, as well as the international law DA or politics. Make them specify exactly what ground they’re losing or ignore their standard.*

#### *OR: Non-unique since all neg generics still apply and PICs solve any risk of offense.*

Hendrickson 13 [(Ed, ex-LD Debater, Meadows School ’13) “Topic Analysis by Ed Hendrickson” NFL Topic Analysis] AT

*So the negative is likely to face one of two things: a very specific fiating affirmative or a very broad affirmative without fiat. The strategic value of reading a plan on this topic is tempered somewhat by the fact that negative arguments (with the exception of some of the kritikal arguments mentioned above) are fairly uniform: attorney-client privilege is essential to ensuring that clients get the best representation they can, which is a key component to the adversarial system of justice. This argument is a sort of one-size-fits-all negative. However, I would not disparage the idea of writing several PICs on this topic, assuming that the aff doesn’t fiat something very specific. This gives the negative turn ground that she would not normally have considering the simplicity of the two sides.*

### A2 Predictability

#### Non-unique: The aff be a subset of whole res, so under their I could read this exact same aff but defend the whole res instead of the plan. So their

#### Wiki solves: The plan is disclosed and is a major part of the topic lit.

## Can’t Fiat SCOTUS Accepts a Test Case

#### Also this would be ridiculous – if I couldn’t fiat it, then all the neg offense would hinge on something that may never happen since there would be the potential that the Court doesn’t accept the case and the plan doesn’t do anything – that would mean both sides advocate the same thing which makes the debate literally irresolvable

## Aff Theory

### Constitution Theory

#### Interpretation – If the aff defends a ruling by the Supreme Court on an issue that already has a test case, the negative must allow the aff to win under the neg standard by proving the plan is merely permitted by the Constitution, if the negatives standard requires consistency with the Constitution, and the neg argues that the most accurate way to assess Constitutional obligations is through prior Supreme Court reasoning.

#### This means against a courts aff, the neg must grant the aff permissibility ground under their constitution standard.

#### The standard is turn ground. When running a courts aff, if I lack permissibility ground, I have to prove an obligation under the Constitution. If Supreme Court decisions outweigh, then I would have to prove the Supreme Court would apply the same logic to my plan, effectively proving that a Supreme Court ruling that does the plan is likely. Given that there is already a test case, turning the NC therefore requires me to prove that the Supreme Court is likely to do the plan – this disproves the inherency of the aff since the status quo would do the plan. Thus, I can’t turn the NC without nullifying all my offense. Turn ground is key to fairness since it ensures I have offense on the NC. Also, it’s key to strategic flex since otherwise I am bound to the AC – allowing the neg to stack the framework debate.

### ---A2 Won’t Go to SCOTUS

#### The case will go to the Supreme Court

Amar 13 [(Vikram David Amar, a Justia columnist, is the Associate Dean for Academic Affairs and Professor of Law at the University of California, Davis School of Law) “Another Front in the Same-Sex Equality Campaign” Justia Aug 13] AT

The oral argument in Smithkline should be interesting. The panel of Judges Schroeder, Reinhardt and Berzon is, even more so than the three-judge panel in the Proposition 8 case, liberal by Ninth Circuit standards. If one had to bet, one might expect this panel to frown on the use of sexual orientation as a basis for peremptories. And if the Ninth Circuit does invalidate sexual-orientation-based peremptories, then the Supreme Court may end up being interested in the case, and could render a ruling that would, directly or indirectly, bear on the question of same-sex marriage bans too. A lot to keep watch on in the coming months.

# New work

## Stuff to answer

### Kritiks

Essentialism K

IDENTITY POLITICS - Clothes Don't Make the Man (or Woman) Jennifer Levi page 91

Assimilation bad <http://www.harvardlawreview.org/media/pdf/vol124_yoshino.pdf>

### Substance

Court Clog DA

Judicial independence DA

## New cuts

### Impact

For a discussion of United States Supreme Court cases emphasizing the need to ensure that juries are drawn from a representative cross section of the community, and suggesting that this re- quirement is necessary to allow the respective biases of different jurors to "cancel each other out," see People v. Wheeler, 22 Cal. 3d 258, 266-71 (1978). In Wheeler the court also noted that "the representative cross-section rule . prevent[s] further stigmatizing of minority groups." Id. at 267 n.6.

For example, Gregory Herek argues that knowing someone who is openly lesbian or gay can -change a prejudiced person's perception of homosexuality from an emotionally charged, value- laden symbolic construct to a mere demographic characteristic, like hair color ...." Gregory M. Herek, P.ychological Heterosexism and Anti-Gay Violence: The Social Psvchology of Big- otry andBashing, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 149, 166 (Gregory M. Herek & Kevin T. Berrill eds., 1992). Similarly, William Eskridge describes a shift in Americans' attitudes towards lesbian and gay individuals as "more Americans realized that they knew somebody who was gay." William N. Eskridge, Jr., Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961, 24 FLA. ST. U. L. REv. 703, 771 (1997). Thus, having openly lesbian, gay, or bisexual individuals on juries may improve homophobic jurors' attitudes about homosexuality.

### Card

Barry 01 [Barry, Kathryn Ann (J.D. candidate. Boalt Hall School of Law, University of California at Berkeley). "Striking back against homophobia: Prohibiting peremptory strikes based on sexual orientation." 16 Berkeley Women's L.J. (2001): 157.] AJ

Protection against sexual orientation discrimination in jury selection is long overdue. The courts must not allow prejudice to compromise the right to an impartial jury. In order to achieve justice, the legal system must prevent attorneys from using inappropriate characteristics, such as sexual orientation, to exclude members of sexual minorities from juries. Forbidding the use of peremptory strikes based on sexual orientation leaves room for lesbians, gay men, and bisexuals to be represented on juries. This representation is important because it may help counter homophobia on juries and may even lead heterosexual jurors to question some of their assumptions about homosexuality. Currently, the American legal system openly discriminates against lesbians, gay men, and bisexuals3 and many Americans condemn homosexuality. Thus, not only does the law often disfavor members of sexual minorities, but even when the court charges the jury with applying a neutral law, homophobic jurors may deny lesbian and gay litigants a fair trial.' In 1998, a National Law Journal poll found that over seventeen percent of prospective jurors admitted they would not be fair or impartial in a trial where one of the parties was gay or lesbian.6 Moreover, some scholars argue that bias against lesbian or gay criminal defendants leads to trials where jurors convict the defendant of "being gay," regardless of whether she committed the crime in question.7 In order to end sexual orientation prejudice and discrimination, the legal system will need to do more than simply prohibit peremptory strikes against lesbians, gay men and bisexuals; it must follow that prohibition with additional transforma- tions in the legal status accorded lesbian, gay, and bisexual individuals. Nonetheless, without impartial juries the courts fail to offer justice to any litigants. Last January, in People v. Garcia, a California state appellate court became the first court in the nation to prohibit the use of peremptory strikes based on a potential juror's sexual orientation.' The court thereby increased the possibility that the perspectives of sexual minorities will be represented on juries and that lesbian, gay, and bisexual litigants will receive fair trials. The court recognized that lesbians and gay men9 face discrimination and persecution'" and that they have diverse backgrounds and experiences." Additionally, the court noted that denying sexual mi- norities the right to serve on juries will "inevitably damage the commu- nity.'

Excluding gay, lesbian, and bisexual jurors based on their sexual ori- entation is problematic regardless of the underlying claim in the case. In Peters v. Kiff, the U.S. Supreme Court warned that the exclusion of cogni- zable groups will result in removing "from the jury room qualities of hu- man nature and varieties of human experience. . . depriv[ing] the jury of a perspective on human events that may have unsuspected importance in any case.""s Additionally, the Wheeler court explained that it is: unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in [cognizable] groups; and hence the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out. 82 Since homophobic persons will inevitably end up on juries, 3 it is problem- atic to exclude lesbians, gay men, and bisexuals. In a sense, the goal of the representative cross section requirement is not to prevent any person who may have a bias from serving on a jury; rather, it is to make certain that different biases will be represented and thereby "cancel each other out." The law allows exclusions based on specific biases where an individual has an experience relating to the case that may affect her impartiality. 4 Simply being lesbian, gay, or bisexual, like being an black, Latino, or fe- male, does not make a person biased. To allow the exclusion of all sexual minorities from a trial simply because the case involves issues relating to sexual orientation would be to deny justice to the jurors, the litigants, and the community.